

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE ) CASE NO. 1:13CV658  
OF THE NAACP, et al., )

Plaintiffs,

V.

PATRICK LLOYD MCCRORY, in his  
Official capacity as Governor  
Of North Carolina, et al.,

Defendants.

LEAGUE OF WOMEN VOTERS OF NORTH ) CASE NO. 1:13CV660  
CAROLINA, et al., )

Plaintiffs,

V.

STATE OF NORTH CAROLINA, et al., )

Defendants.

UNITED STATES OF AMERICA, ) CASE NO. 1:13CV861

Plaintiff,

V.

STATE OF NORTH CAROLINA, et al., ) Winston-Salem, North Carolina  
 ) July 14, 2015  
 Defendants. ) 9:02 a.m.

TRANSCRIPT OF THE **TRIAL/DAY TWO**  
BEFORE THE HONORABLE THOMAS D. SCHROEDER  
UNITED STATES DISTRICT JUDGE

Proceedings recorded by mechanical stenotype reporter.  
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APPEARANCES:

For the Plaintiff:  
(NAACP)

PENDA D. HAIR, ESQ.  
DONITA JUDGE, ESQ.  
DENISE D. LIEBERMAN, ESQ.  
ADVANCEMENT PROJECT  
1220 L Street, NW, Suite 850  
Washington, DC 20005

DANIEL T. DONOVAN, ESQ.  
BRIDGET K. O'CONNOR, ESQ.  
MICHAEL A. GLICK, ESQ.  
CHRISTOPHER J. MANER, ESQ.  
JODI WU, ESQ.  
KIRKLAND & ELLIS, LLP.  
655 15th Street, NW, Suite 1200  
Washington, DC 20005

IRVING JOYNER, ESQ.  
N. C. CENTRAL UNIVERSITY SCHOOL OF LAW  
P. O. Box 374  
Cary, North Carolina 27512

(LWV)

ALLISON JEAN RIGGS, ESQ.  
ANITA S. EARLS, ESQ.  
GEORGE E. EPPSTEINER, ESQ.  
SOUTHERN COALITION FOR SOCIAL JUSTICE  
1415 W. Highway 54, Suite 101  
Durham, North Carolina 27707

JULIE A. EBENSTEIN, ESQ.  
DALE E. HO, ESQ.  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
125 Broad Street, 18th Floor  
New York, NY 10004-2400

CHRISTOPHER A. BROOK, ESQ.  
AMERICAN CIVIL LIBERTIES UNION OF NC  
P. O. Box 28004.  
Raleigh, North Carolina 27611-8004

1 APPEARANCES (Continued):

2 (USA)

CATHERINE MEZA, ESQ.  
JOHN A. RUSS, IV, ESQ.  
DAVID G. COOPER, ESQ.  
AVNER M. SHAPIRO, ESQ.  
SPENCER R. FISHER, ESQ.  
ELIZABETH M. RYAN, ESQ.  
JENIGH J. GARRETT, ESQ.  
U. S. DEPARTMENT OF JUSTICE  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
  
GILL P. BECK, ESQ.  
U. S. ATTORNEY'S OFFICE  
100 Otis Street  
Asheville, North Carolina 28801

11 (Intervenor  
12 Plaintiff):

JOSHUA L. KAUL, ESQ.  
PERKINS COIE, LLP  
1 E. Main Street, Suite 201  
Madison, Wisconsin 53703  
  
BRUCE V. SPIVA, ESQ.  
AMANDA R. CALLAIS, ESQ.  
PERKINS COIE, LLP.  
700 13th Street, NW, Suite 600  
Washington, DC 20005  
  
JOHN W. O'HALE, ESQ.  
POYNER SPRUILL, LLP  
P. O Box 1801  
Raleigh, North Carolina 27602-1801

21 For the Defendants:

22 (State of NC)

ALEXANDER M. PETERS, ESQ.  
KATHERINE A. MURPHY, ESQ.  
N.C. DEPARTMENT OF JUSTICE  
P.O. Box 629  
Raleigh, North Carolina 27602

APPEARANCES (Continued):

(State of NC)            THOMAS A. FARR, ESQ.  
                             PHILLIP J. STRACH, ESQ.  
                             MICHAEL D. MCKNIGHT, ESQ.  
                             OGLETREE DEAKINS NASH SMOAK & STEWART  
                             P. O. Box 31608  
                             Raleigh, North Carolina 27622

(Governor)            BUTCH BOWERS, ESQ.  
                             BOWERS LAW OFFICE, LLC  
                             1419 Pendleton Street  
                             Columbia, South Carolina 29201

Court Reporter:        BRIANA NESBIT, RPR  
                             Official Court Reporter  
                             P.O. Box 20991  
                             Winston-Salem, North Carolina 27120

## INDEX

**PLAINTIFFS' WITNESSES:****PAGE:**

WILLIAM A. KITTRELL

Direct Examination by Mr. Eppsteiner	35
Cross-Examination by Ms. Murphy	41

DR. J. MORGAN KOUSSER, PH.D.

Direct Examination by Ms. Riggs	42
Cross-Examination by Mr. Bowers	76
Cross-Examination by Mr. Farr	84
Redirect Examination by Ms. Riggs	96
Recross-Examination by Mr. Farr	97

ISABEL NAJERA

Direct Examination by Mr. Brook	104
Cross-Examination by Mr. McKnight	112

CHARLES T. CLOTFELTER, PH.D.

Direct Examination by Ms. Meza	125
Cross-Examination by Mr. Strach	141
Redirect Examination by Ms. Meza	159

TERRILIN C. CUNNINGHAM

Direct Examination by Mr. Shapiro	163
Cross-Examination by Mr. McKnight	181
Redirect Examination by Mr. McKnight	184
Recross-Examination by Mr. McKnight	185

## EXHIBITS

<u>Exhibits:</u>		<u>Identified</u>	<u>Received</u>
P-46	Dr. J. Morgan Kousser's expert report	48	62
P-418	7/24/13 Email exchange/Nancy Evans and Rep. Harry Warren	69	71
P-678	6/10/2015 SEIMS data of deposited affected voters	116	119
P-679	Transcript of Designated portions from video deposition of Ms. Yvonne Washington		121
P-680	Transcript of Designated portions from video deposition of Mr. Carnell Brown		121
P-681	Transcript of designated portions from video deposition of Dr. Lynne Vernon-Feagans	123	
P-240	Dr. Lynne Vernon-Feagans' expert declaration	123	
P-252	Dr. Lynne Vernon-Feagans' expert surrebuttal declaration	123	
P-509	Family Life Project graph/access to vehicle	123	
P-510	Family Life Project graph/access to technology	123	
P-511	Family Life Project graph/literacy level	123	
P-512	Family Life Project Graph/residential instability factors	123	
P-513	Family Life Project graph/hardship experiences since 2008	123	
P-237	Dr. Charles Clotfelter's expert declaration, 2/12/15	128	129
P-249	Dr. Charles Clotfelter's expert surrebuttal declaration, 3/24/15	128	129
P-309	Photograph of Terrilin Cunningham	178	179

## P R O C E E D I N G S

**THE COURT:** Good morning, everyone. I think yesterday we finished with the video deposition. Are we ready to proceed with a new witness?

**MR. DONOVAN:** We are, Your Honor.

**MR. FARR:** Your Honor, could we talk about some preliminary matters about evidentiary issues that you raised yesterday, or would you like to defer that?

**THE COURT:** Have you reached some resolution on some of those?

**MR. FARR:** No. I was going to talk about your issue -- you said you wanted some more cases on the hearsay issue. I also wanted to alert to the Court to some other issues that are going to come up today with some of the experts. I can defer any of those issues until later, Your Honor, if you would like.

**THE COURT:** That's all right. Go ahead and give me a heads-up.

**MR. FARR:** Your Honor, I think you asked for some cases on -- you were not happy with the briefing that the parties did on hearsay issues involving State employees, I think, is one of the questions that you had.

**THE COURT:** I wouldn't say I wasn't happy. I just was not yet satisfied on the answer to that.

**MR. FARR:** Well, we took that as being not happy,

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 Your Honor, and that was a concern to us. So I would like to  
2 hand up a case, a Middle District case, it is called *Tabor v.*  
3 *Thomas Built Buses*. The citation is 2010 WL 148431, Middle  
4 District, January 12, 2010. May I approach, Your Honor?

5 **THE COURT:** Yes, please.

6 **MR. FARR:** Your Honor, if you -- you certainly can  
7 take -- I am sure you will read this whole case. If you will  
8 turn to page 4, one of the holdings by the Court in this case  
9 is that in order to overcome a hearsay objection, you have to  
10 first identify the identity of the person who allegedly made  
11 the statement. If you can't -- if the witness cannot state the  
12 name of the person who allegedly made the statement, then the  
13 statement is hearsay and it cannot possibly be an admission.  
14 So that's the first point, Your Honor.

15 The second case we want to hand up -- we are still  
16 looking for more authority on this, Your Honor, but I recall  
17 you said you had questions about at what stage or what level a  
18 supervisory authority or employment --

19 **THE COURT:** And does it matter. Right. Does it  
20 matter that there has to be a certain level that somebody can  
21 bind an entity by what they said?

22 **MR. FARR:** We are still looking for that. We did  
23 find one case, Your Honor. It's an unpublished decision by the  
24 Fourth Circuit, 229 F.3d 1142. The case is *Hassman v. Caldera*.  
25 May I approach, Your Honor?



1           **THE COURT:** Yes, please.

2           **MR. FARR:** I think, Your Honor, what this decision  
3 says is for a statement to be an admission, there has to be  
4 some evidence that the statement was made within the scope of  
5 the authority of the person making the statement.

6           **THE COURT:** All right.

7           **MR. FARR:** So we are still looking for some other  
8 cases, Your Honor, on what the parameters would be for  
9 supervisors in a state agency. If we find any other cases, we  
10 will certainly get them to you.

11           A heads-up, Your Honor, today we are going to have  
12 testimony by -- and we appreciate the Plaintiffs have been  
13 trying to give us a schedule of who is coming to testify. We  
14 want to thank them for that. One of their witnesses who may  
15 testify today is Dr. Morgan Kousser.

16           We have two issues with Dr. Kousser. First of all,  
17 much of his report is based upon newspaper articles. We would  
18 object to the newspaper articles coming into evidence for the  
19 truth of the matter asserted in the newspaper articles.

20           He may testify that experts reasonably rely on  
21 newspaper articles in forming an opinion. Whether it's  
22 reasonable to rely upon newspaper articles is something that  
23 the Court can decide, but we do object to those articles coming  
24 in for the truth of the matter asserted.

25           Also, Your Honor, if you go back to our motion in

1 limine, it's Docket Number 288 that was filed in the 861 case,  
2 we object to any of these experts giving testimony on the  
3 ultimate legal conclusion as to whether North Carolina engaged  
4 in intentional discrimination.

5 They can give testimony about facts that they  
6 think -- or matters that they believe relate to the Court's  
7 finding on that issue, but we do object to them giving  
8 testimony on the ultimate legal conclusion.

9 And those would be our concerns on evidentiary issues  
10 today, Your Honor.

11 **THE COURT:** All right.

12 **MR. FARR:** Thank you.

13 **MR. DONOVAN:** Good morning, Your Honor.

14 **THE COURT:** Good morning.

15 **MR. DONOVAN:** Two issues. First, we also are having  
16 good folks research the issue on the party admissions. I do  
17 want to give you a framework first. We will give you cases  
18 probably later today.

19 The starting point obviously is a party admission,  
20 that is, is it within the scope. We have case law that provide  
21 party admissions can be applied to the Government. That's  
22 settled. So then the issue -- and our research to date shows  
23 that -- the question is is it within the scope.

24 **THE COURT:** Let me back up a minute. The State of  
25 North Carolina is a Defendant. Does that mean any and all

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 agencies of the State now are a party for that purpose?

2 **MR. DONOVAN:** I think it does, but we haven't  
3 finished that research. Also the State Board is as well.

4 **THE COURT:** I understand that.

5 **MR. DONOVAN:** You get that. So then I think the  
6 question is is the DMV or legislators. I think the answer is  
7 yes, but we haven't finished that yet.

8 But as you think through this issue, you get then to  
9 is it within the scope, which I think Mr. Farr gave you a case.  
10 We wouldn't disagree with you about that. Don Wright is the  
11 general counsel. You admitted that. He is the general counsel  
12 of the SBOE.

13 Then with each -- I think you have to take each  
14 statement on its own. A poll worker in this state, that's the  
15 way elections are run. So if you can establish that it was a  
16 poll worker, they have been trained, they were acting within  
17 the scope, I think it is admissible.

18 I think the one issue that was mixed up is either --  
19 the question was is it binding. I think we have to separate  
20 binding from an interrogatory response where the entity is  
21 bound versus admission into evidence and you still give it the  
22 weight that you assign it, because, obviously, if we establish  
23 that people are told in different counties, any individual one,  
24 you may say, has limited weight; but if we start establishing  
25 multiple places, I think it has weight. So I think you need to

1 separate binding to a corporation that are bound with just  
2 admission.

3 We are going to get you cases on that.

4 **THE COURT:** Okay.

5 **MR. DONOVAN:** Ms. Riggs is going to address -- that's  
6 her witness, Mr. Kousser. I have that with Mr. Lichtman, so I  
7 may follow up.

8 But one point that we think we've missed is that a  
9 lot of these newspaper articles are already in evidence. So  
10 what you have at issue is a limited scope. They are in because  
11 of the preliminary injunction and our stipulation. So what's  
12 before you is a very limited amount. And, in fact, as Your  
13 Honor well knows, you cited one of those statements in your  
14 opinion, as did the Fourth Circuit.

15 So the area of dispute --

16 **THE COURT:** Just to be clear, the rule on preliminary  
17 injunction is that I can consider hearsay, of course, and for  
18 that reason, I may have cited it; but if it's been stipulated  
19 to, then that's a different situation.

20 **MR. DONOVAN:** That's my point. I understand it can  
21 be. It has been stipulated to, the entire evidentiary record.  
22 So most of these issues that the State is now complaining  
23 about, the ship has sailed. It's in evidence; and once it's in  
24 evidence, it can be used for any and all purposes.

25 There is a subset, I believe, that were not admitted

1 by stipulation. So those would still be at issue from a  
2 substantive evidence point. We will address those as those  
3 arise.

4 I will leave to Ms. Riggs and maybe follow up on kind  
5 of can an expert rely on them as their methodology.

6 **THE COURT:** Let me ask real quick: What about the  
7 stipulated issue?

8 **MR. FARR:** No, Your Honor, we do not agree with that.  
9 We do not stipulate to the introduction into evidence of the  
10 newspaper articles from the preliminary injunction hearing.

11 Also, Your Honor, I want to say that county employees  
12 do not work for the State. Poll workers are not State  
13 employees. They are employees of the counties. The counties  
14 are not Defendants here. There is a hundred counties in North  
15 Carolina. It would be substantially prejudicial for the  
16 defense in this case to be held liable for statements by poll  
17 workers from counties, and, particularly, Your Honor, very few,  
18 if any, of the statements attributed to poll workers by any of  
19 these witnesses identified the name of the poll worker, and so  
20 we go back to the first case I handed up to you. For the  
21 admission, we have to know who the person was who made the  
22 statement.

23 Also, Your Honor, there has to be evidence, in  
24 addition to the fact that the statement was made, that the  
25 statement was being made within the scope of the person's

1 authority. There has to be additional evidence showing that it  
2 was within the scope of the person's authority. I think that  
3 case I handed up to you says that.

4 **THE COURT:** I understand that. What did you  
5 stipulate to in terms of the preliminary injunction record?

6 **MR. STRACH:** Your Honor, the stipulation is that --  
7 the one I have in my notebook is Docket -- ECF 259 in the 861  
8 case.

9 **THE COURT:** Okay. Give me a second to catch up with  
10 you. I have 275 in the 658 case. Is that the same thing?

11 **MR. STRACH:** Joint stipulations regarding preliminary  
12 injunction record.

13 **THE COURT:** Yes. It was entered on June 12th.

14 **MR. STRACH:** Yes, Your Honor.

15 **THE COURT:** And it has five numbered paragraphs.

16 **MR. STRACH:** That's right. The paragraph that I  
17 believe would be relevant here would be paragraph 2,  
18 documentary exhibits. It just says that, "The parties agree  
19 that the exhibits identified in Exhibit A shall be incorporated  
20 into the trial record as trial exhibits."

21 We certainly did not intend to, and we don't think we  
22 were agreeing to their admissibility at trial. We were just  
23 saying that they could be used as trial exhibits.

24 **THE COURT:** What does it mean to be incorporated into  
25 the trial record?

1           **MR. STRACH:** I think it just means that they can be  
2 used as an exhibit. Certainly, we didn't say that we were  
3 waiving any objections to admissibility. One could argue, at  
4 best, that language is ambiguous, but we certainly weren't  
5 stipulating to the admissibility of those exhibits.

6           In fact, Your Honor, when we submitted our objections  
7 to their exhibit list, we noted objections even to those  
8 exhibits in the PI, preliminary injunction, record that they  
9 are now claiming we stipulated to their admissibility. So we  
10 made it very clear when we submitted our objections that we  
11 were not agreeing to those documents being admitted --  
12 admissible.

13           **THE COURT:** What would the point of paragraph 2 have  
14 been? Why did you need to stipulate that those were  
15 incorporated as trial exhibits if they were exhibits -- if they  
16 are just exhibits and not part of the record?

17           **MR. STRACH:** Your Honor, like I said, that can be  
18 argued that's ambiguous language, but we would just simply say  
19 that to the extent there is a stipulation that should reflect  
20 the parties' agreement, we certainly were not agreeing that  
21 documents would be admissible and that we were waiving any  
22 objections to them.

23           **THE COURT:** Okay. All right. I understand.

24           Mr. Donovan?

25           **MR. DONOVAN:** Sure. Thank you. Your Honor, the

1 reason you do a stipulation for evidence to come in is for  
2 evidence to come into the trial record. We actually discussed  
3 this on a conference call with Your Honor, not in detail, but  
4 Rule 65 expressly envisions that preliminary injunction  
5 evidence can -- can come into evidence. This stipulation  
6 actually is quite specific, and it's not ambiguous, drafted by  
7 the many lawyers who negotiated in this room.

8           The documentary exhibits, the agreement was that all  
9 the exhibits -- both sides had some picayune objections each  
10 side raised. We all agreed that it all comes in.

11           What's the proof is look at three, Your Honor. We  
12 did say that authenticity and hearsay regarding expert reports  
13 is reserved. We didn't say that up above. That's because all  
14 the documentary exhibits come in. Expert reports, which  
15 everyone recognized may have really more hearsay than  
16 authenticity, is reserved. There were charts that are attached  
17 to this, a series of emails, and this issue is kind of coming  
18 up, Your Honor, as the State, both on this and deposition  
19 designations, are kind of -- I know we are all in trial, but  
20 when we make these agreements and we prepare our cases and we  
21 prepared to present it efficiently to you, those decisions have  
22 to mean something. So I respectfully submit that the --

23           **THE COURT:** You said authenticity and hearsay is  
24 reserved. It's waived.

25           **MR. DONOVAN:** I'm sorry, waived. I'm sorry, yes.



1 But there was kind of provided the expert needs to  
2 show up. That's a little different than documentary. You see  
3 we also agreed that all the fact witness declaration that Your  
4 Honor has, that's in. That's substantive evidence, recognizing  
5 it wouldn't normally be that way, and then we said deposition  
6 designations are not coming in. We kind of negotiated those  
7 one by one, which we've done.

8 So this kind of was kind of exhaustive, it took a  
9 long time, but it sets the record for Your Honor, recognizing  
10 that you heard a lot of testimony from last time.

11 So we'd submit that the stipulation is here. Your  
12 Honor recognized that in your order, setting kind of what we  
13 had to do pretrial, recognizing we were stipulating, not the  
14 details, just referring to the stipulation. And, frankly, we  
15 relied on that to present our case sufficiently and with the  
16 witnesses we are here to present.

17 **THE COURT:** Okay. Did you want to be heard,  
18 Ms. Riggs? Anything in addition to that?

19 **MS. RIGGS:** So I do want to be heard on the motion in  
20 limine with regard to Dr. Kousser, but not on the stipulation  
21 issue.

22 **THE COURT:** Mr. Strach?

23 **MR. STRACH:** I was just going to point out, Your  
24 Honor, what paragraph 3 shows is that when we were waiving  
25 objections to admissibility or, et cetera, we were very clear

1 about it. That's what we were -- that was our impression of  
2 what we were doing. When we were waiving something, we were  
3 very clear about it in here. So I think that shows we were not  
4 waiving anything in paragraph 2.

5 **THE COURT:** Okay. All right. As to your witness?

6 **MS. RIGGS:** Yes, Your Honor, good morning.

7 **THE COURT:** Good morning.

8 **MS. RIGGS:** First, with respect to Defendants' motion  
9 in limine on intent evidence, expert testimony on intent isn't  
10 objectionable just because it embraces an ultimate issue that  
11 this Court has to decide. That's the text of Rule 704.

12 **THE COURT:** I don't know that there is any objection  
13 to any expert giving testimony as to facts which they contend  
14 indicate intent. So is there any objection to that?

15 **MR. FARR:** No, Your Honor.

16 **THE COURT:** Okay. So you can assume all of that is  
17 coming in, as long as there is proper foundation, and I agree  
18 with that. I think the question is, are you going to be asking  
19 your witnesses did the State of North Carolina intentionally  
20 discriminate based on whatever race or ethnicity. And you can  
21 ask that question, or you can ask something else like is there  
22 evidence of intent. If so, what did you find. And then lay it  
23 out.

24 **MS. RIGGS:** Our experts have been studying this  
25 subject for years and have looked at other situations where

1 there is --

2 **THE COURT:** I understand. Are you going to try to  
3 ask them the ultimate question: Did North Carolina racially  
4 discriminate?

5 **MS. RIGGS:** The experts have opinions on that based  
6 on the synthesis of all the broad circumstantial evidence. I  
7 don't think that them opining on that is even problematic in  
8 the Fourth Circuit, because the Fourth Circuit has allowed  
9 experts to testify on ultimate facts.

10 So, for example, in *U.S. v. Perkins*, in the Fourth  
11 Circuit in 2006, the Court held an expert testimony on the  
12 reasonableness of a police officer's use of force was  
13 admissible, even though that was the decision ultimately. It  
14 was a reasonably objective determination.

15 **THE COURT:** What did the expert say?

16 **MS. RIGGS:** The expert opined that the police  
17 officer's use of force was reasonable. That was the expert's  
18 testimony, and that was admitted, not because that then proved  
19 the decision -- the ultimate question that the Court had to  
20 answer, but that is what the expert -- it was within the scope  
21 of what the expert's normal course of study was, and it wasn't  
22 replacing the Court's independent judgment. But here, with  
23 historians who have been studying North Carolina history and  
24 legislative process across the country for decades --

25 **THE COURT:** I understand. Are you going to be asking

1 your experts questions like, in your opinion, did the State of  
2 North Carolina discriminate based on race, or are you going to  
3 ask questions more along the lines of did you examine the  
4 evidence, did you find evidence that you think is supportive of  
5 the determination that they may have discriminated?

6 **MS. RIGGS:** Yes.

7 **THE COURT:** Is it the latter as opposed to the  
8 former?

9 **MS. RIGGS:** It is closer to the latter. Applying the  
10 rubric of factors that you've identified that are relevant,  
11 what was your conclusion.

12 **THE COURT:** Okay. I will take it, depending on what  
13 the question is.

14 **MS. RIGGS:** Okay.

15 **THE COURT:** You recognize, of course, the decision's  
16 for the Court to make?

17 **MS. RIGGS:** Absolutely.

18 **THE COURT:** So the important information is the  
19 factual information.

20 **MS. RIGGS:** Absolutely. With regard to the other  
21 motion in limine aspect, which is newspaper articles,  
22 Dr. Kousser reviewed a variety of sources, which he'll describe  
23 in detail. I don't want to waste your time. Newspaper  
24 articles were just one source.

25 Under Rule 803, newspaper articles aren't hearsay if

1 they are offered as evidence of intent, motive or state of  
2 mind, which a lot of the cases, that's what the newspaper  
3 articles were reviewed as.

4 But under Rule 807, I think that's even more  
5 applicable. Rule 807 permits out-of-court statements to be  
6 admitted when there is strong indicia of reliability, and  
7 Dr. Kousser will explain why these newspaper articles are  
8 reliable.

9 **THE COURT:** Let me stop you for a minute. Typically,  
10 when experts and historians rely on newspaper articles, they do  
11 that to then form an opinion as what the public may have known  
12 in a period of time. So, frequently, newspaper articles are,  
13 even though hearsay, permitted because they are not being  
14 entered for the truth of what they say, they are being entered  
15 to indicate what people would have known who read the  
16 newspaper.

17 So if the newspaper says on January 1 that using a  
18 certain pharmaceutical now will cause a certain disease, that  
19 article can come in, not to prove that using the pharmaceutical  
20 can cause the disease, but it can come in to show that people  
21 may have been aware of that fact because they read the article.  
22 Do you follow me?

23 **MS. RIGGS:** Yes.

24 **THE COURT:** To the extent that the experts rely on  
25 newspaper articles for that kind of analysis, I understand.

1 The concern I have is -- putting the stipulation aside, I have  
2 to decide that issue -- if experts are relying on statements of  
3 state legislators who are quoted in the paper and they are  
4 relying on that for proof of intent, that decision seems to let  
5 into the back door something that through the front door I  
6 would have some concern about, and, that is, having a newspaper  
7 article that quoted a legislator come into evidence all by  
8 itself. That would be hearsay, and it would be offered to  
9 prove the truth of the matter in the article, and, that is,  
10 that that's what the legislator said and that was the  
11 legislator's intent. So intent seems to be aligned with the  
12 truth of the statement.

13           So my concern is if that can't come in through the  
14 front door absent a stipulation, then having an expert rely on  
15 it basically lets it right through the back door, and I am  
16 concerned about that. So that's my concern.

17           As a practical matter, is that the problem we are  
18 going to be looking at? And, if so, how many of those  
19 instances are we talking about?

20           **MS. RIGGS:** So we are not moving through Dr. Kousser  
21 the independent newspaper articles into evidence today. So, to  
22 some extent, this isn't being teed up right now. And  
23 Dr. Kousser certainly is reading them, basing his opinion on  
24 them, the first category you discussed that you didn't have a  
25 problem with.

1           With regard to the second category, the Defendants  
2 have not made available any legislators to talk about their  
3 intent.

4           **THE COURT:** I understand. They have a legislative  
5 privilege, and they are entitled to rely on that.

6           **MS. RIGGS:** Right. So --

7           **THE COURT:** You can criticize them for that, but  
8 that's their privilege.

9           **MS. RIGGS:** Yes, Your Honor. I'm sorry. I  
10 understand, but I still think that the residual rule under 807  
11 is applicable here because we will provide evidence through  
12 witnesses and experts that -- and exhibits, emails from  
13 legislators, that these statements in the public -- there is a  
14 high indicia of reliability. It seems in these emails,  
15 everyone is acknowledging -- for example, Senator Apodaca said,  
16 "Now we are going with the full bill." There are legislative  
17 emails talking about "what is that full bill then?"

18           I mean, so this is indicia of reliability. It is  
19 also very probative of the material facts in this case, the  
20 larger ultimate issue of intent, but also some of the factors,  
21 the *Arlington Heights* factors, so process, background, that  
22 kind of stuff. So these are facts -- material facts that you  
23 need for your ultimate conclusion.

24           These statements are better than evidence otherwise  
25 available. We don't have the legislators available to speak,

1 and so each of these statement -- so each of those is present  
2 for these statements by legislators in the newspapers.

3 **THE COURT:** All right. How many statements are we  
4 talking about as a practical matter that fit that category, the  
5 "now we can go with the full bill" kind of statement?

6 **MR. DONOVAN:** I would say a dozen, Your Honor.

7 Let me address two issues, Judge. One is we have  
8 Dr. Lichtman, who is also -- we are not going to overlap.

9 Two things. First, the newspaper articles. Those  
10 are statements by legislators. They are in a newspaper. So I  
11 understand you say that's hearsay. Here is the issue.

12 **THE COURT:** It is actually probably double hearsay.

13 **MR. DONOVAN:** It probably is, but it is actually  
14 curable, and we did that. One is -- what we tried to do is  
15 we -- those are obviously not protected by legislative  
16 privilege. So we talked to the State and suggested  
17 stipulations. The State refuses to do that. Okay. Fine. We  
18 said we are going to subpoena them. They are not privileged by  
19 those statements.

20 Mr. Strach emailed Mr. Kaul and said that the State  
21 will seek sanctions if you subpoena them. So, actually, Your  
22 Honor, I would ask for a ruling. We have to resolve this  
23 because we are going to subpoena those legislators.

24 **THE COURT:** Why didn't you all -- the case has been  
25 pending for two years, and I have been working with the



1 magistrate judge and handled a couple of appeals. I thought  
2 you all would have litigated that; and if there was a problem,  
3 taken it to the magistrate judge for a ruling.

4 **MR. DONOVAN:** Our view is a lot of this is in through  
5 the stipulation; but if it's not, I want the Court to know we  
6 intend to subpoena those legislators. We think it is a waste  
7 of their time. The State should tell us if they didn't. The  
8 State has access to them. They've talked to them before.

9 But I do want to raise for Your Honor that is an  
10 issue, and I understand your back boor-front door concern. We  
11 want to resolve that because I don't want you to think our  
12 experts are just relying on newspaper articles; but it is one  
13 piece of their analysis, and we think it is substantive  
14 evidence. So that's kind of point number one on the newspaper  
15 articles. We will try to work with the State today, but I  
16 think we may tee that up for you because we may need to  
17 subpoena these legislators.

18 **THE COURT:** I encourage you to work it out, if you  
19 can. I have to say, this case has been pending for quite a  
20 while and consumed a fair amount of time from the judges of the  
21 court in the pretrial stage; and there was quite a few  
22 amendments to the pretrial order, and the parties asked for  
23 extensions and all sorts of things, and that would have been  
24 the appropriate time to have gone head to head, if there was a  
25 fight about it, and resolved it at that time. I wanted to try

1 the case with whatever evidence you all have marshaled.

2           **MR. DONOVAN:** We're not asking for a delay or  
3 anything. We think a lot of it is in through the stipulation.  
4 So that's easy for us. I am just kind of letting Your Honor  
5 know -- and Mr. Peters has said he will accept those subpoenas.  
6 So we may be serving those today.

7           I think on the other issue that Ms. Riggs -- that is,  
8 the experts considering it, is this kind of tracks the  
9 *Arlington Heights* factors. Newspapers and these statements are  
10 just one piece. There is not a statistical analysis --

11           **THE COURT:** Do you have any case where a Court has  
12 permitted reliance -- I read -- or reviewed the cases you had  
13 in your materials, but I am looking for a case where the Court  
14 says that a statement like this from a legislator that's quoted  
15 in a paper can be introduced directly in the case. I think the  
16 answer to that is likely to be no because it is hearsay. It is  
17 a double hearsay unless you bring the reporter in.

18           Then the next question is, do you have any case where  
19 an expert can rely upon that? I would be interested to see  
20 those because it has to be the type of material upon which an  
21 expert would normally rely, and it may be that an expert might  
22 normally rely on reading newspapers. I don't know how that  
23 trumps the standard that I have to apply for admission of that  
24 as substantive evidence, which is, in effect, how it has to  
25 come in in the courtroom. So that is my concern.

1           **MR. DONOVAN:** I understand. We will look at those,  
2 but I do think as you think -- and you will hear both of them  
3 and their methodology, and it has been accepted just last year  
4 in the Texas photo ID case.

5           **THE COURT:** What was accepted?

6           **MR. DONOVAN:** Testimony on intent.

7           **THE COURT:** I don't have any difficulty --

8           **MR. DONOVAN:** It was a similar analysis is my point.  
9 It is not just the intent, is that you will hear from both  
10 Dr. Kousser and Dr. Lichtman, this is what they do for a  
11 living. They're both professors. You kind of walk through --  
12 because, obviously, this is different. What they are  
13 presenting is circumstantial evidence of intent, which the  
14 State says in most cases you have to look for, and that's  
15 what's presented. Obviously, with circumstantial evidence, it  
16 is a buildup of different categories, not just one piece of  
17 evidence. This is kind of one leg of the analysis, but, yes,  
18 it has been accepted.

19           **THE COURT:** You say "it."

20           **MR. DONOVAN:** This method --

21           **THE COURT:** I want to be careful what we are talking  
22 about.

23           **MR. DONOVAN:** This understand. This methodology.  
24 I'm now moving away from newspaper articles.

25           **THE COURT:** The methodology I understand. At least

1 preliminarily I don't have any problem with that. I think the  
2 expert can testify as to -- with the proper foundation, as to  
3 the facts that the expert thinks support elements of a claim.

4 **MR. DONOVAN:** Sure.

5 **THE COURT:** All right. I am concerned about the  
6 expert saying that I am relying on newspaper articles because  
7 in the article, legislator was quoted as saying X, Y or Z; and  
8 I think that's evidence of intent because I have no idea of  
9 knowing if the statement was quoted in full or whether it was  
10 quoted accurately, whether it was taken out of context, whether  
11 there is more to it and that only the first half of it was  
12 quoted for whatever reason. And those are the reasons why  
13 I'm -- I think the hearsay rule applies.

14 **MR. DONOVAN:** We understand that, and we'll take that  
15 into consideration.

16 **THE COURT:** I give you fair warning. I am concerned  
17 about those statements. Unless it's been stipulated to that  
18 they are in the record, then that part I do have some concern  
19 about that. So be careful about that. I am going to look at  
20 the stipulation.

21 **MR. DONOVAN:** That would be helpful.

22 **THE COURT:** I acknowledge that at the preliminary  
23 injunction stage, hearsay comes in, and I am not sure what the  
24 parties meant when they signed this. I understand the  
25 argument. So I will take a look at that.

1           **MR. DONOVAN:** Thank you, Your Honor.

2           **MR. FISHER:** Your Honor, Spencer Fisher representing  
3 the United States. And if I could, I just want to make two  
4 points very briefly on what's being discussed because the  
5 United States also plans on presenting an expert to speak about  
6 legislative intent.

7           We believe that the testimony offered by the  
8 Plaintiffs in this case easily satisfies the standard for  
9 admissibility, and I just wanted to point to the United States'  
10 filing, and it's ECF Number 323 in the 658 case.

11           We attached the order from *Perez v. Texas* in that  
12 case. In that order -- and this goes to the first issue that  
13 Your Honor discussed, is the inferences that can be drawn from  
14 the intent expert's testimony. The judge stated that the  
15 expert's testimony about legislative intent necessarily  
16 includes any inferences or deductions that the expert may draw  
17 from the information that he reviewed and analyzed.

18           So the question of to what extent the expert can  
19 testify to, what Your Honor just described as the ultimate  
20 question of whether the legislature discriminated based on  
21 race, we would say that the intent expert can draw the  
22 inferences and conclusions upon -- based upon his review, his  
23 expert review of the record.

24           **THE COURT:** Are you going to ask the ultimate  
25 question of your expert, or are you, rather, going to ask

1 whether this is evidence that supports the conclusion that it  
2 was based on race?

3           **MR. FISHER:** Well, Your Honor, I think we plan on  
4 asking whether there is evidence that supports that conclusion.  
5 We plan on also asking the expert what he, using his expert  
6 analysis, was able to infer or deduce from that evidence, and  
7 that very may well get us closer to the ultimate question.

8           **THE COURT:** I will just -- I understand the argument,  
9 and I did read the case. I am going to take it on a  
10 case-by-case basis and question-by-question basis. I guess the  
11 question might be that it is a little bit of mixed fact/legal  
12 question, and fact questions are for the experts to testify to.  
13 The legal questions are ones I have to decide. This one seems  
14 to straddle that.

15           At the end of the day, I think everybody realizes  
16 that, as a practical matter, whether or not somebody gives such  
17 an opinion, we don't have a jury here, so I know how to weigh  
18 that with the appropriate standards, and so it may not have the  
19 same concern that you would with a jury. They might give it  
20 extra weight simply because they hear it from an expert.

21           **MR. FISHER:** Understood, Your Honor.

22           **THE COURT:** I acknowledge that. So I will approach  
23 it question by question; and if the objection is raised, I will  
24 take it; and, if not, we'll just keep going.

25           **MR. FISHER:** And if I could just take one more moment

1 to just point to another page of that filing that I just  
2 mentioned, page 8. We have cited -- I'm counting -- four  
3 different cases where social scientists, such as the  
4 Plaintiffs' experts, in this matter have relied on newspaper  
5 articles.

6           **THE COURT:** The question I have again is, for what  
7 reason? I tried cases where I put on experts who used  
8 newspaper articles. I am familiar with the issue, but it was  
9 usually for a purpose to show what might have been known or to  
10 provide some context. It is usually not for the truth of the  
11 matter asserted in the article.

12           **MR. FISHER:** Okay. I think in this case, Your Honor,  
13 you know, and we've made the argument as well in that filing,  
14 that this evidence could also be offered to show -- and I think  
15 you mentioned the effect on the public at the time, but to  
16 show, for instance, what other legislators thought about the  
17 process at the time, what they understood was going on with the  
18 bill at the time, for actions that they might take or may not  
19 take as a result of those statements that were put out there  
20 and not for the truth of the matter stated.

21           Also, Your Honor mentioned kind of the timing of  
22 this. The Defendants, up until this point, have not impugned  
23 the credibility of these news sources. They haven't indicated  
24 that any legislators were misquoted in any of these news  
25 sources. We would also proffer that the reliability of these

1 news sources, you know, weighs heavily --

2 **THE COURT:** How would they contest that without  
3 waiving the legislative privilege?

4 **MR. FISHER:** That also has been mentioned by  
5 Ms. Riggs, the fact that, you know, they had the legislative  
6 privilege puts us in a different position --

7 **THE COURT:** That only makes it more difficult for the  
8 Plaintiffs. I acknowledge that, but it's a privilege, and  
9 sometimes I see a fact of a privilege; but I don't know how the  
10 Defendants would try to attack or clarify a statement without  
11 having a witness then made available to attack or clarify the  
12 statement, in which case they then waive privilege. So I am a  
13 little concerned about an invitation to bring the legislator in  
14 in order to clarify something if you think there is a problem  
15 with it because they do have a privilege they can stand on.

16 It's not absolute, as I've held, but they do have a  
17 privilege they can stand on.

18 **MR. FISHER:** I just want to make one more point, and  
19 this case goes back to the case -- Your Honor has asked for  
20 authority. In the *Bolden* case that we cited, *City of Mobile v.*  
21 *Bolden*, the expert did rely on newspapers to give his opinion  
22 on the intent behind at-large elections that were held in  
23 Mobile. So we would direct the Court to that opinion, if you  
24 feel that the --

25 **THE COURT:** What was it in the newspaper that the



1 expert relied on in that case? What precisely was it?

2 **MR. FISHER:** We'll have to take a look at it.

3 **THE COURT:** I don't dispute that they can rely on  
4 newspapers. I've said that. The question I have is, for what  
5 purpose? And that's the key issue. So if it's for the truth  
6 of some statement in there, then that I would be interested in  
7 seeing. If it's for some other purpose, then I wouldn't be  
8 surprised that that happened because I'm inclined to think that  
9 that's appropriate.

10 **MR. FISHER:** We would be happy to provide additional  
11 information on that.

12 Just in closing, we do feel that the sources -- these  
13 sources are vital to the intent portion of this case, and that  
14 the experts relying on that to come to their opinions is vital  
15 as well, and they will come up here and tell you why these are  
16 reliable and why they use them in their normal course of  
17 business in what they do.

18 **THE COURT:** We'll take it question by question and  
19 see where we go.

20 **MR. DONOVAN:** Your Honor, going back to the  
21 stipulation point I was pointing out, if you look at your  
22 order, which is Docket Number 271, just by reference, you  
23 directed the parties in paragraph 2 that the parties shall file  
24 two things, A, a stipulation listing all exhibits,  
25 declarations, deposition designations from the PI hearing they

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 agree will become part of the trial order, and you said we  
2 should identify which ones we object to.

3           So, therefore, I think that led to that stipulation,  
4 if you're trying to interpret what the parties meant when they  
5 said the exhibits come into the record, Your Honor. Thank you.

6           **MR. FARR:** Your Honor, may I respond to that briefly?

7           **THE COURT:** Briefly, yes.

8           **MR. FARR:** Your Honor, the stipulation number 2  
9 says -- and this is Document 861 -- excuse me, Document 259 in  
10 Case 861. It says that the exhibits can be part of the trial  
11 record, but as you just indicated, newspaper articles can be  
12 exhibits for matters other than purposes of the story being  
13 admitted for the truth of the matter asserted in the newspaper  
14 article.

15           And, secondly, the order you just mentioned indicated  
16 that the parties could object to exhibits, which we did object  
17 to the exhibits when we filed our objections to their exhibit  
18 list. So the stipulation requires that there be a meeting of  
19 the mind of the parties; and as the Plaintiffs have known for a  
20 long time, based upon motions we've filed and other things that  
21 have come up, the Defendants have never, ever intended or done  
22 anything to waive their objections to newspaper articles coming  
23 in for purposes of proving the truth of the matter asserted  
24 therein. That intent was reflected by the objections we filed  
25 to their exhibits when we filed the objections pursuant to the

1 Court's order.

2           **THE COURT:** Okay. I understand. The only other  
3 preliminary matter I want to raise, and I am just going to put  
4 this out as a question and maybe we can get some evidence in,  
5 is there were several witnesses who have been asked, as a  
6 result of some of the things that happened to them, how it made  
7 them feel; and it is not readily apparent to me what element  
8 that goes to, how they feel about something.

9           The issue, I thought, was burden and intent of the  
10 legislature. So at some point I am going to be interested in  
11 your view as to what that's relevant to and how I should  
12 consider that, if at all.

13           At least one of the witnesses then talked about  
14 burden and so, in that context, I understand the answer; but  
15 the question was a little unclear to me as to how that relates  
16 to the case. So, at some point, if you can set me straight on  
17 that, that would be helpful.

18           Why don't we proceed then. Call your next witness.

19           **MR. EPPSTEINER:** Good morning, Your Honor, George  
20 Eppsteiner for the League of Women Voters Plaintiffs. The  
21 Plaintiffs call William Kittrell.

22 **WILLIAM A. KITTRELL**, PLAINTIFFS' WITNESS, at 9:44 a.m., being  
23 first duly sworn, testified as follows:

24                               DIRECT EXAMINATION

25

1 **BY MR. EPPSTEINER**

2 Q Good morning.

3 A Good morning.

4 Q Can you please introduce yourself to the Court.

5 A My name is William Kittrell.

6 Q And, Mr. Kittrell, what is your middle name?

7 A Alexander.

8 Q How old are you, Mr. Kittrell?

9 A I'm 20 years old.

10 Q Where were you born?

11 A I was born in Greensboro, North Carolina.

12 Q In what city do you currently reside?

13 A Greensboro, North Carolina.

14 Q Is that in Guilford County, North Carolina?

15 A Yes, sir.

16 Q Have you lived in other counties in North Carolina?

17 A I resided in Henderson, North Carolina, Vance County, for  
18 a few years.

19 Q And when you say "a few years," from what time period --  
20 from what year to what year was that?

21 A About mid 2010 to 2013.

22 Q And when you lived in Henderson, I think you said in Vance  
23 County, was that during a particular time of schooling for you?

24 A I was finishing my sophomore year through my senior year.

25 Q When you say sophomore year to senior year, is that of

1 high school?

2 A High school, yes.

3 Q So other than the about two years of high school that you  
4 were in Vance County, and other than living in Greensboro, have  
5 you lived in any other places?

6 A No.

7 Q Did you graduate from high school?

8 A Yes.

9 Q Have you ever registered to vote?

10 A I did.

11 Q Where did you register to vote?

12 A Vance County.

13 Q And when was that?

14 A When I was 18, when I got my license.

15 Q So would that would have been -- you said you are 20 now.  
16 Would that have been sometime in 2013?

17 A Yes.

18 Q Do you currently attend college?

19 A Yes.

20 Q Where?

21 A North Carolina A&T State University.

22 Q Is that located in Greensboro, North Carolina?

23 A Yes, sir.

24 Q Guilford County?

25 A Yes, sir.

1 Q And during the summertimes, do you stay in Greensboro in  
2 Guilford County?

3 A Yes.

4 Q Do you intend to remain in Greensboro after graduation?

5 A Yes.

6 Q Do you have relatives in Greensboro?

7 A I do.

8 Q What relatives do you have in Greensboro?

9 A My mother's parents reside in Greensboro.

10 Q And your mother as well?

11 A Yes.

12 Q What are you currently studying in college?

13 A Secondary English education.

14 Q And what would you like to do for employment after  
15 graduation from college?

16 A Hopefully have a teaching job.

17 Q When you say "teaching job," for a particular age group?

18 A Between 6th grade and 12th grade.

19 Q Why do you want to be a teacher?

20 A Growing up, I always had a knack for teaching. I always  
21 had the patience for kids, and I hope one day to make a  
22 difference in some kid's life.

23 Q Let's talk about the November 2014 election.

24 Mr. Kittrell, did you attempt to vote in this election?

25 A I did.

1 Q Was this during the early voting period?

2 A Yes.

3 Q Do you recall what day of the early voting period?

4 A I believe it was the first Saturday of early voting.

5 Q Were you able to vote?

6 A No.

7 Q What happened that first Saturday of early voting?

8 A I went to go early voting at the local recreation center  
9 up the street from my house. After waiting in line for about  
10 30 to 45 minutes, I got to the desk, and they asked for my  
11 name, and I wasn't in the system for Guilford County.

12 Q And when you said you went to the local rec center, do you  
13 recall the name of the center where you tried to vote?

14 A I believe it was the Brown Center.

15 Q And the Brown Center is in Guilford County, North  
16 Carolina?

17 A Yes.

18 Q And at the time that you went to early voting, was this  
19 sometime in October of 2014?

20 A Yes.

21 Q And how long had you been living in Guilford County at the  
22 time you voted?

23 A For a few -- well, for about a year.

24 Q So you waited in line, and did you approach a registration  
25 table?

1 A I did.

2 Q Okay. And why exactly did they say you couldn't vote?

3 A They said that I wasn't registered in Guilford County to  
4 vote.

5 Q How long did your total voting experience take you? I  
6 believe I you said you waited in line for 30 to 45 minutes; is  
7 that right?

8 A Yes.

9 Q So the entire experience of voting, how long did that take  
10 you?

11 A About an hour and 15 minutes.

12 Q Why did you believe you could vote on that Saturday?

13 A Because I figured since I was a resident of North Carolina  
14 and I had registered to vote in North Carolina, that I would be  
15 able to vote in any county that I was in.

16 Q When you say any county that you are in, do you mean the  
17 county in which you live?

18 A Guilford County, yes.

19 Q When you went to vote in 2014 at the Brown Center, did  
20 they offer you a provisional ballot?

21 A No.

22 Q Why did you want to vote in the November 2014 election?

23 A Because I've waited to vote basically all my life, and I  
24 figured that it was the perfect time and I thought that my  
25 vote -- it would actually count for once.



1 Q Is voting important to you?

2 A Yes.

3 Q Why is it important to you?

4 A Because I feel that it is my duty to have a voice in  
5 decisions made.

6 Q And after you weren't able to vote that day, how did it  
7 make you feel about your right to vote?

8 A I was disappointed, frustrated.

9 Q Why were you disappointed and frustrated?

10 A Because it's -- my mother has always told me about voting,  
11 that I should always vote, and the fact that I couldn't simply  
12 because I wasn't registered in a certain county, it was really  
13 frustrating to me.

14 Q Thank you, Mr. Kittrell.

15 **MR. EPPSTEINER:** I don't have any other questions at  
16 this time.

17 **THE COURT:** Any cross?

18 **MS. MURPHY:** Thank you, Your Honor.

19 CROSS-EXAMINATION

20 **BY MS. MURPHY**

21 Q Good morning, Mr. Kittrell. I believe you testified you  
22 lived in Guilford County for about a year prior to your attempt  
23 to vote in 2014; is that correct?

24 A Yes.

25 Q And during that time, is it correct that you did not make

1 any attempt to register in Guilford County?

2 A No.

3 **THE COURT:** I'm sorry?

4 **BY MS. MURPHY**

5 Q Is it correct or incorrect? Did you make any attempt to  
6 register to vote in Guilford County during that year prior to  
7 the election of 2014?

8 A No, I did not.

9 **MS. MURPHY:** I have no further questions. Thank you  
10 very much, Mr. Kittrell.

11 **THE COURT:** Anything further?

12 **MR. EPPSTEINER:** No questions, Your Honor.

13 **THE COURT:** You may step down, sir.

14 **MS. RIGGS:** Your Honor, the League of Women Voters  
15 Plaintiffs call Dr. Morgan Kousser.

16 **J. MORGAN KOUSSER, PH.D., PLAINTIFFS' WITNESS,** at 9:53 a.m.,  
17 being first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 **BY MS. RIGGS**

20 Q Professor Kousser, can you introduce yourself to the  
21 Court, please.

22 A I'm Morgan Kousser. I teach at Caltech. I live in  
23 Pasadena, California. I am happy to see rain.

24 Q Please push the microphone a little bit closer down. What  
25 is your current position at Caltech?

1 A I'm the William R. Kenan, Jr. professor of history and  
2 social science at Caltech.

3 Q And how long have you been teaching at Caltech?

4 A For about 45 years.

5 Q Can you briefly tell the Court about your training,  
6 background?

7 A I was an undergraduate at Princeton, majored in history.  
8 I then went to Yale to study with C. Vann Woodward, did  
9 history, political science. I have taught at Caltech for that  
10 period of time, also taught at Harvard, Oxford, Claremont,  
11 graduate school, Hong Kong last fall.

12 Q What is the emphasis of your study and teaching at Caltech  
13 and the other institutions that you've taught at?

14 A Well, I have published extensively on southern history and  
15 politics, on voting rights, on education, history of  
16 discrimination in education. I have taught a course for nearly  
17 45 years on the U.S. Supreme Court, taught it in Hong Kong last  
18 fall, an interesting experience.

19 Q Dr. Kousser, have you had the opportunity to study  
20 political history in North Carolina prior to your involvement  
21 in this case?

22 A Yes. My senior thesis at Princeton was called "Tennessee  
23 Politics and the Negro, 1948 to 1964." And it had a little  
24 section at the end on North Carolina, so that long. There is a  
25 large part of a chapter of my dissertation for the book called

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 *The Shaping of Southern Politics*, which concerns the  
2 disenfranchisement of the blacks and poor whites. Part of the  
3 chapter -- a large of part of a chapter is on North Carolina.

4 I did an article on educational discrimination by race in  
5 North Carolina in the late 19th and early 20th Centuries after  
6 that. I testified in the remand case of *Shaw v. Reno*,  
7 eventually called *Shaw v. Hunt*. And there is a -- the report  
8 there was incorporated as a long chapter in my book *Colorblind*  
9 *Injustice*. So I've done a lot on North Carolina in the past.

10 Q Speaking of that, Dr. Kousser, what kind of expert work  
11 have you done in the past relating to the testimony -- related  
12 to what you were asked to do in this case?

13 A Well, I have been testifying since 1979 in voting rights  
14 cases. The first one that I testified was to -- went up to the  
15 Supreme Court as *Hunter v. Underwood*. It was on the criminal  
16 disenfranchisement provision of the 1901 Alabama Constitution,  
17 and the question was whether that was adopted with a racially  
18 discriminatory intent. I concluded that it was.

19 The only very direct, what is referred to as "smoking gun"  
20 evidence in that case came from a newspaper article. The  
21 legislators, in this case a member of the constitutional  
22 convention, were a little less discreet about their racial  
23 intentions in 1901 than legislators are today. And the person  
24 who framed the criminal disenfranchisement provision told a  
25 newspaper reporter -- was quoted in the newspaper as saying

1 that the wife-beating provision of the criminal  
2 disenfranchisement provision alone would disenfranchise, I  
3 think, 60 percent of the black males in Alabama. So that was  
4 my first case.

5 I also testified in the *Bolden* case that's been referred  
6 to, *City of Mobile v. Bolden*, in the remand case, which  
7 concerned the intent of the framers of what turned out to be an  
8 1874 law setting up an at-large election system in Mobile.  
9 Newspapers were a major source there. There were other  
10 sources, but there weren't any legislative hearings. There  
11 wasn't a transcript of legislative debates.

12 Newspapers were very important for the background of the  
13 events that took place, and I testified that I thought that the  
14 at-large system had been adopted with racially discriminatory  
15 purpose.

16 Q Dr. Kousser, beyond *Bolden* and *Underwood*, have you  
17 testified in other cases on legislative intent?

18 A I have. One of the most important ones was *Garza v.*  
19 *Los Angeles Board of Supervisors*. There the question was  
20 whether a series of redistrictings were done with racially  
21 discriminatory intent. I wrote a very long paper, almost as  
22 long as the paper that I wrote in this case. It used a variety  
23 of resources. The legislative privilege was not so strictly  
24 enforced as in this case.

25 I read 65 depositions of legislators, people who did the

1 redistricting, aides to legislators, et cetera, et cetera, and  
2 also newspapers, all sorts of other documents that were  
3 available.

4 And the largely circumstantial case led me to the  
5 conclusion that the series of racial redistrictings, which made  
6 the most Hispanic supervisorial district in LA increasingly  
7 non-Hispanic white in each redistricting, were adopted with a  
8 racially discriminatory intent.

9 The District Court judge in that case, the first third of  
10 his opinion is on intent, and it largely tracked my report.

11 Q In addition to your expert work, have you published on the  
12 topic of legislative intent and racially discriminatory intent  
13 specifically?

14 A I have. When I finished the Garza report and the District  
15 Court opinion came out, I thought perhaps I should publish it,  
16 publish my report. So I talked to a friend and colleague who  
17 happened to be dean at the University of Southern Carolina Law  
18 School and said, what's the best thing to do to get this into a  
19 law review? And he said, well, law students would like to see  
20 cases cited.

21 And so I spent a very long time thinking about cases,  
22 reading cases on legislative intent and going through them,  
23 trying to make sense of them, trying to play out the rationales  
24 that the judges and historians and political scientists have  
25 used to try to determine intent so that I could make some sort

1 of systematic framework to use, to analyze intent so that it  
2 wouldn't have to be something that was just ad hoc each time.  
3 And I published in the law review a long article called "How to  
4 Determine Intent: Lessons from LA."

5 Q In the course of your studies, have you had the  
6 opportunity to analyze evidence relating to the intent of  
7 legislation in other contexts beside voting or redistricting  
8 legislation?

9 A Yes, I've done it with regard -- I did the Texas voter ID  
10 case, the first of the Section 5 cases, and did an intent  
11 analysis in Washington. Sorry about my voice.

12 Q Did you need some more water?

13 A Eventually, yes.

14 **MS. RIGGS:** Your Honor, the League of Women Voters  
15 Plaintiffs tender Dr. Morgan Kousser as an expert in political  
16 history, southern history and voting rights.

17 **THE COURT:** Any objection?

18 **MR. BOWERS:** No objections from the Defendants, Your  
19 Honor, to his qualifications as an expert. However, I will  
20 note for the record that we will be, as my colleague Mr. Farr  
21 said, objecting to any reliance on statements of legislators  
22 found in newspaper articles for purposes of determining intent.

23 **THE COURT:** All right. He may give his opinions.

24 **BY MS. RIGGS**

25 Q Dr. Kousser, what were you asked to do in this case?

1 A I was asked to analyze as many documents as I -- that were  
2 provided to me or that I could find which were relevant to two  
3 questions. One was essentially a Section 2 question, whether  
4 there was a racially discriminatory effect or a likely racially  
5 discriminatory effect of the passage of H.B. 589, and the  
6 second, whether it had been adopted with a racially  
7 discriminatory intent.

8 Q That first point, are those -- is that evidence known as  
9 the Senate Factors evidence?

10 A Yes.

11 Q Did you produce a report in this case, Dr. Kousser?

12 A I did.

13 **MS. RIGGS:** Your Honor, may I approach?

14 **THE COURT:** Yes.

15 **MS. RIGGS:** I am handing the Court what has been  
16 marked as Plaintiffs' Exhibit 46, which is Dr. Kousser's report  
17 in this case.

18 **BY MS. RIGGS**

19 Q Dr. Kousser, you have a copy; am I right?

20 A Yes.

21 Q Is this the report that you created at the request of  
22 counsel?

23 A Yes.

24 Q In this report, you examined a series of factors that you  
25 said were relevant to the question of whether House Bill 589



1 was adopted with discriminatory intent. Can you explain to the  
2 Court how you identified these factors?

3 A Well, as I said, this came out of *Garza* very directly, and  
4 I tried to identify as many factors as I could. I started with  
5 the *Arlington Heights* case, which has more of a discussion of  
6 intent than any other case, but *Arlington Heights*, like many  
7 Supreme Court opinions, states things but does not fully  
8 elaborate them. Often for the elaboration of the reasons why  
9 this counts, you have to look at lower Court opinions and also  
10 practices.

11 I also examined what I had done in the past, even -- when  
12 I did my Ph.D. dissertation and first book, I examined the  
13 question of whether disenfranchisement had been adopted with a  
14 racially discriminatory intent. The actions of southern  
15 states, the 11 southern states that managed to secede from the  
16 Union in 1861, when they adopted disenfranchisement rules,  
17 laws, constitutional provisions, the poll tax, literacy tests,  
18 understanding clauses, grandfather clauses, et cetera, whether  
19 that was adopted with racially discriminatory intent.

20 So I had been studying these things for quite a long time,  
21 and I used my knowledge and anything that I could find out that  
22 historians had said or political scientists had said about what  
23 sort of evidence counts as intent and what the rationales for  
24 counting that as intent are, and I tried to set them out  
25 systematically in a series of factors.

1       My first pass came up with nine factors. When I got to  
2 the -- putting it into the book form, *Colorblind Injustice*, I  
3 came up with ten factors, but they are essentially coming out  
4 of the *Arlington Heights* factors more than anything else.

5 Q       Why is the use of this ten-factor rubric helpful in a  
6 legislative intent case?

7 A       Well, it is helpful to organize the evidence. You can --  
8 you don't have to come at it sort of hit or miss, and you  
9 can't -- you thought through it before. I think the most  
10 important is with this model, as with lots of kind of models in  
11 social science, it gives you a chance to be wrong. It gives  
12 you a chance to disprove, and so at various points, sometimes  
13 in cases, for example, in the Texas voter ID case, I looked at  
14 the adoption of particular laws or provisions, which I  
15 concluded, after looking at the same sorts of factors, were not  
16 adopted with racially discriminatory intent. So that it is  
17 possible under this analysis to disprove that things were  
18 adopted with a racially discriminatory intent.

19       It is a framework, a systematic framework, and it allows  
20 you to analyze things systematically.

21 Q       So to be clear, using this framework, you've looked at  
22 laws and concluded they were not motivated by discriminatory  
23 intent?

24 A       Yes.

25 Q       Can you describe, given all of the intent cases that you

1 studied and have been involved with, what types of -- what is  
2 the scope of evidence that you look at in doing your work?

3 A It is much like the scope of evidence that I publish in  
4 academic journals. I look at all sorts of things. I look at  
5 hearings. I look at transcripts of debates. I look at  
6 newspapers. I look at reports that were in the public domain  
7 at the time. I look at statistics in *The Shaping of Southern*  
8 *Politics*. I analyzed election returns. I did what's called  
9 ecological regression, which is the same technique that's been  
10 used in voting rights cases to determine racially polarized  
11 voting. I've displayed things in graphs, on maps. I look at  
12 every type of evidence that's possibly available. Depositions  
13 I mentioned before.

14 Q Is the evidence relating to legislative intent in the  
15 cases you've worked on voluminous?

16 A It is quite voluminous. The *Garza* analysis took me 18  
17 months, and as I said, I had 65 depositions and read enumerable  
18 newspapers.

19 Q When you said amongst the types of evidence that you  
20 review, reports in the public domain, does that include reports  
21 from state agencies?

22 A Yes.

23 Q What else might that include?

24 A Anything that informed the debate at the time,  
25 particularly think tank reports or reports from -- well, one of

1 the things that I haven't mentioned that I should have  
2 mentioned, sorry, is scholarly articles and books, which I  
3 certainly took into account, and sometimes they are important  
4 in particular debates, and I would certainly take those into  
5 account.

6 Q Dr. Kousser, you said you reviewed newspaper articles as a  
7 piece of your analysis. Can you explain to the Court why you  
8 find newspapers to be a useful source of information?

9 A Newspapers are useful for lots of reasons. One of them is  
10 to set the context, what was generally going on at the time,  
11 what were people generally thinking at the time, what had gone  
12 before, what did people do, what other sorts of things did  
13 people do, what did they say about other things that they had  
14 done.

15 A good example taken not from a case, but from my book,  
16 *The Shaping Southern Politics*, is the analysis of a law in  
17 Tennessee called the Dortch Law passed in 1890. It was a  
18 secret ballot act. It applied to four counties in Tennessee,  
19 and one might think that a secret ballot act was simply passed  
20 to make sure that voters could vote without telling anybody  
21 else how they voted, but in Tennessee, it was used to  
22 disenfranchise, particularly people who were less literate, and  
23 that was particularly in 1890 African-Americans.

24 I learned from newspapers a great deal about the sponsor  
25 of the act, Mr. Dortch. In particular, that in the election

1 where he was elected in Fayette County, Tennessee, the election  
2 was quite violent. They kept African-Americans away from the  
3 polls for the first time since the Fifteenth Amendment had been  
4 passed, and he led that effort to keep them away from the  
5 polls.

6 He then went to the legislature with the stated purpose of  
7 disenfranchising as many blacks as possible. There was no  
8 other way to learn that than to look at the newspapers, and  
9 that was very informative to me about Mr. Dortch, his purposes  
10 and the ultimate purposes of the passage of the secret ballot  
11 law.

12 Q In the course of your work, have you found that newspaper  
13 articles are a reliable source for your analysis?

14 A They are often reliable. They should always be viewed as  
15 every other piece of evidence, skeptically. You have to ask --  
16 you have to try to find other evidence that corroborates them,  
17 if that's available.

18 An example from this particular case is that there was an  
19 effort after the 2011 voter ID bill was vetoed to pass local  
20 voter ID laws in the legislature. A newspaper said, well, the  
21 Attorney General issued an opinion that said that those kinds  
22 of laws were not according to the -- not legal according to the  
23 North Carolina State Constitution.

24 I then found the Attorney General's opinion. So that  
25 corroborated what was in the newspaper, but it was a newspaper

1 article that alerted me to the existence of that opinion.

2 Q Have you a chance to assess generally the credibility of  
3 statements in newspaper articles attributed to individuals or  
4 legislators?

5 A In general, I think a lot of them are credible. I was  
6 trying to think while the -- while you and the other lawyers  
7 were talking about this, whether there had been any statements  
8 here in this particular case where someone said, I did it  
9 because, I did X because, and that that was very important in  
10 my analysis, and I couldn't think of any. There may be some  
11 there that I couldn't remember, but there were certainly no  
12 articles that I can recall that I relied upon from newspapers  
13 that simply said that.

14 Let me say also that with regard to newspapers and other  
15 evidence, if there were -- suppose that it were possible to ask  
16 every legislator why they voted for such and such a bill. In  
17 the Garza case, there were lots of attempts to do that. Why  
18 did you draw the lines in this manner? And the conventional  
19 answer again and again and again in all the depositions was "I  
20 don't know" or "I don't remember."

21 In the context of a legal case or if people are  
22 anticipating a legal case, if you ask legislators why they did  
23 something, the people who were for it will say something  
24 predictable, the people who were against it will say something  
25 predictable, and it won't be very meaningful. You don't expect

1 to see somebody say, oh, I did this because I don't like  
2 African-Americans, or I did this simply because  
3 African-Americans are going to be discriminated against because  
4 of this. Those are not credible.

5 So if you compare them with contemporary newspapers making  
6 statements usually before the case is filed, the newspaper  
7 evidence is expected to be more credible. Though one should  
8 look at it skeptically than the evidence that would come about  
9 by asking people directly, did you do this because X.

10 Q Do political historians conventionally rely on newspapers  
11 in the way you have?

12 A Yes.

13 Q Now that we have discussed your methodology, I want to  
14 move on specifically to your findings in your report, and there  
15 are a couple of times that I will refer to a page number in  
16 your report, so just have it handy.

17 First, Dr. Kousser, you didn't start your analysis in  
18 2013. So my question is, why did you look at changes in  
19 election laws earlier in the 1990s and 2000s?

20 A If the question is why did someone vote for or why did the  
21 legislature adopt something -- some particular law, some  
22 particular rule, the commonsensical thing to look at,  
23 commonsensical starting place, commonsensical baseline, and the  
24 one that political scientists or historians would look at is  
25 what did it replace. What is the status quo?

1       So in order to try to provide evidence which would be  
2 useful to the judge in making his decision about why this was  
3 adopted, I had to start with what went before, what was the  
4 legislature reacting to, and so I looked at the laws that it  
5 repealed.

6   Q     Can you turn with me to page 20 of Exhibit 46.  
7 Dr. Kousser, when you get there, can you explain to the Court  
8 when you started looking at the laws that existed before House  
9 Bill 589, what did you find?

10   A     Well, North Carolina, as previous studies have shown, had  
11 a long history of racial discrimination in voting laws. In the  
12 1990s, this turned around. It turned around almost completely.  
13 Instead of trying to make it more difficult for  
14 African-Americans to -- and people of color in general to vote,  
15 the legislature made it easier, and the proof of that, the  
16 proof that the laws had that effect is in the numbers.

17       There was a dramatic increase in turnout in North Carolina  
18 elections, and if you look at Table 1, there was a 45 percent  
19 rise in turnout in 1988 in the Presidential election. Table 1  
20 looks at only Presidential elections. North Carolina was 48th  
21 in the country in turnout. By 2012, it was 11th in the  
22 country. That had jumped, the turnout had increased quite  
23 substantially even by 2004.

24       So it wasn't simply something that happened because you  
25 had an African-American candidate running for President. It



1 happened even with John Kerry running for the Democratic -- as  
2 the Democratic nominee in 2004. So a very dramatic increase  
3 from 48th in the country to 11th in the country in turnout.

4 Q In studying that time period, what laws were passed that,  
5 in your opinion, played a role in changing that?

6 A Well, there was a series of laws. There was a law  
7 allowing no-excuse absentee ballots for -- that did not have to  
8 be mailed in, so-called early voting, for a period of time,  
9 eventually 17 days. That made it much easier to vote, and it  
10 particularly made it much easier to vote for people who might  
11 have difficulty getting off of their work or difficulty that  
12 they had picking up their kids after school, all of those sort  
13 of things. They could vote at a time that was easier for them.  
14 They could vote over a long period of time. Particularly, they  
15 could vote on two Sundays before the election.

16 **MR. FARR:** Your Honor, I would just like to make an  
17 objection to that question to the extent that the question  
18 asked him to give an opinion as to what caused an increase in  
19 turnout. There has been no testimony that he's analyzed what  
20 caused an increase in turnout. To the extent he is going to  
21 testify about election laws that had been passed during this  
22 period of time where turnout has increased, we have no  
23 objection.

24 **MS. RIGGS:** I'm fine with him testifying to that  
25 extent.

1           **THE COURT:** All right. Sustained.

2           **THE WITNESS:** There was another law allowing votes to  
3 be counted even if they were cast in the wrong precinct. The  
4 votes that were not precinct specific could be counted. There  
5 was a law allowing what has been called in this case I think  
6 same-day registration during the early voting period. They  
7 could change their residency or they could register for the  
8 first time during that period. There was also, finally, a law  
9 allowing 16- and 17-year-olds to preregister to vote so that  
10 they would be able to do so when they were 18.

11 **BY MS. RIGGS**

12 Q And are the rest of the relevant laws in your report?

13 A Yes.

14 Q Can you turn with me to Table 2 now.

15 A I have it.

16 Q When all of these new laws and voting practices are being  
17 put into place in the '90s and 2000s, what phenomenon did you  
18 notice happening with African-American turnout?

19 A African-American turnout rose quite substantially, more  
20 substantially than white turnout, and it rose, as we see, if we  
21 look at -- if we compare 1996 and 2004, the rise is 45 percent  
22 in African-American turnout. It is not 45 percentage points,  
23 but it is 45 percent if the denominator is 36.9. So even  
24 before 2008, the rise is very substantial.

25 Note also that the rise is particularly substantial in

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 Presidential elections in African-American turnout, and the  
2 trend is best looked at in Presidential elections and not in  
3 the off-year elections, the Congressional elections. As you  
4 can see when you look at the table, the rise in turnout in  
5 off-year elections is not quite so much. So you don't expect  
6 as much of an effect of whatever changes had taken place in the  
7 off-year elections.

8 Q Dr. Kousser --

9 **MR. FARR:** Your Honor, I object to that question  
10 because he is again testifying to the effect of the changes in  
11 the election law on the turnouts, and he has not given any  
12 testimony that he's studied how the changes in the election  
13 laws affected the turnout.

14 **MS. RIGGS:** Your Honor, he is testifying that there  
15 was a change in law accompanying a dramatic change in  
16 participation and turnout. He's a voting rights expert. He's  
17 reviewed voting laws across the country. I think he is  
18 entitled to, as a historian and political scientist, opine on  
19 whether there is a relationship between the two.

20 **THE COURT:** I am going to sustain the objection for  
21 lack of foundation as to cause, but the numbers speak for  
22 themselves, and I will examine the numbers for what they are.

23 **BY MS. RIGGS**

24 Q Dr. Kousser, in the course of your study, have you had the  
25 opportunity in the past to study the relationship between

1 turnout and election laws?

2 A I have, the basis more than anything else for *The Shaping*  
3 *of Southern Politics*. What I did there is people previous to  
4 my study had not had the statistical competence to estimate  
5 turnout by race. Ecological regression gave me the ability to  
6 estimate turnout by race, and the basis for that book, more  
7 than anything else, was sequence of estimates of turnout by  
8 race and looking at the laws that had been passed and other  
9 events that took place around the same time.

10 In particular, lots of historians previously had thought  
11 that violence and/or ballot box stuffing had totally  
12 disenfranchised African-Americans long before the laws that  
13 were passed took place. I could show by looking at the  
14 sequence of estimates of turnout that that wasn't the case. My  
15 inference, from looking at the sequence of election laws and  
16 comparing them with the sequence of estimated turnout by race,  
17 was that the laws caused the decline in turnout. So it is  
18 directly analogous to what I did here.

19 Q So going back, though, to your findings in this case, why  
20 was the change in turnout relevant to your analysis on what  
21 might have motivated the legislature?

22 A There was a very large increase in African-American  
23 turnout, African-American political participation. It changed  
24 politics in North Carolina. North Carolina moved from a state  
25 that had not been really severely contested in Presidential

1 elections for a while to one of the most contested states.

2 It allowed for the election of candidates on the state  
3 level who were favorable to African-Americans and whom  
4 African-Americans supported. So it changed politics  
5 considerably, and that change then feeds into the narrative of  
6 why the 2013 H.B. 589 needed to be adopted.

7 Q I want to talk now about some of the specific factors you  
8 looked at.

9 MS. RIGGS: Before I do that, League of Women Voters  
10 Plaintiffs would like to move into evidence Plaintiffs'  
11 Exhibit 46.

12 THE COURT: Any objection?

13 MR. BOWERS: No objection, Your Honor, with the  
14 exception to the hearsay objections that we've already noted  
15 for the Court.

16 MS. RIGGS: To clarify, that's in regard to  
17 newspapers, not the content of the report being hearsay?

18 MR. BOWERS: That's correct.

19 THE COURT: Okay.

20 MR. FARR: Also, Your Honor, any testimony here about  
21 the ultimate legal conclusion, we object to.

22 THE COURT: I have no idea what's in it. It's 70  
23 pages long.

24 MS. RIGGS: We are not going to have time to go  
25 through everything. So I want to get it moved it into

1 evidence, and we'll hit some highlights.

2 **THE COURT:** And I will read it later?

3 **MS. RIGGS:** Otherwise, we might be here a very long  
4 time.

5 **THE COURT:** All right. I will admit it without  
6 objection, except as to anything dealing with newspaper  
7 articles, I will reserve as to the truth of the contents of the  
8 newspaper articles. What was the other basis?

9 **MR. FARR:** Just, Your Honor, if --

10 **THE COURT:** The cause issue?

11 **MR. FARR:** Yes, sir. If he's testified that the  
12 intent of the legislature was to discriminate, we would object  
13 to that coming into evidence for the reasons we've stated.

14 **MS. RIGGS:** Well, that's different than cause.

15 **THE COURT:** Does he say that in here?

16 **MS. RIGGS:** As a historian, he is opining on what the  
17 evidence in totality and in context means. The fact that he is  
18 offering --

19 **THE COURT:** Where does he say that?

20 **MS. RIGGS:** Throughout. I mean, Your Honor, his  
21 abstract of findings is a summary; but just because Dr. Kousser  
22 is, as an historian and political scientist, reviewing all of  
23 the evidence and placing it in context, concluding that there  
24 was a discriminatory intent, doesn't supplant your decision on  
25 that front.

1 But he is a historian. He's studying what motivates  
2 the passage of election laws. His analysis wouldn't be very  
3 useful if he just threw up facts on a piece of paper and then  
4 made no analysis of those facts. So he provides an analysis of  
5 what the facts mean.

6 **THE COURT:** Okay. I don't know how I can possibly  
7 parse through this right now and make that determination.

8 **MR. FARR:** Your Honor, we're perfectly fine for you  
9 to reserve your ruling on that objection.

10 **THE COURT:** I am going to do that.

11 **BY MS. RIGGS**

12 Q In your report, Dr. Kousser, did you go through the facts  
13 applicable to each of the intent factors you've identified  
14 before?

15 A I did.

16 Q Can we talk first -- one of the factors that you  
17 identified as relevant to determining the legislative intent is  
18 the historical context. Can you explain that? Is that what  
19 we've talked about so far?

20 A Yes.

21 Q What about -- another factor that you discussed is models  
22 of human behavior. Can you explain that?

23 A Yes. When anybody is analyzing an action in daily life or  
24 in grandiose ways, you have some sense of how human beings act,  
25 and it's inevitable that this sort of thing informs your

1 analysis. What I tried to do is to make as conscious as  
2 possible the -- some assumptions and generalizations with which  
3 one approaches evidence.

4 We don't have a lot of historical or social scientific  
5 laws in the same sense that physics has laws. We don't have a  
6 first law of thermodynamics, but we have generalizations that  
7 we can make about how human beings react to particular  
8 situations, and that informs what we think in analyzing  
9 analogous situations.

10 In this case, it was informative to me to start with what  
11 I did in *The Shaping of Southern Politics* in the section about  
12 North Carolina and analyze what happened in North Carolina in  
13 the 1890s. North Carolina was a very competitive state, very  
14 competitive for the South in the post-Reconstruction Era.

15 In no election was there a landslide majority statewide  
16 from 1872 through 1900, but in the 1890s, largely because of  
17 the worldwide Depression, a coalition between Republicans and  
18 Populists took over the state. The Republican Party, then the  
19 core constituency -- the Republican Party in North Carolina in  
20 the 1890s was African-American, and when a Republican governor  
21 was elected in 1896 after a landslide Republican Populist  
22 legislature was elected in 1894, they passed a series of  
23 election laws. The election laws made it easier to vote, and  
24 there was an increase in turnout.

25 African-Americans got elected to the legislature. They



1 got elected to local office. This was threatening to the  
2 people who believed in white supremacy. In 1898, they reversed  
3 this with what was called the White Supremacy Campaign. It was  
4 violent. They stuffed ballot boxes.

5 In 1900, they passed a constitutional amendment to  
6 disenfranchise as many blacks as possible. Again, this was  
7 quite violent, and the ballot box stuffing was quite  
8 overwhelming.

9 If you analyze the election returns, as I did, and  
10 estimate how blacks voted in the 1900 election, you come to the  
11 conclusion that virtually every black who voted voted to  
12 disenfranchise all blacks in the future. That was not  
13 credible, but the election returns, as recorded, seemed to show  
14 that.

15 So there was a political movement which was based in the  
16 African-American community. It was triumphant. It changed  
17 North Carolina politics. That political movement was reversed  
18 with the changes of election laws. I found that not merely  
19 interesting as a historical grace note, but informative as to  
20 how people operated in a similar situation that took place a  
21 hundred years later.

22 Q Did you look at the behavior of the legislature in the  
23 modern context in light of those historical behavioral  
24 patterns?

25 A Yes, I did.

1 Q What -- did you also look at whether the text of the law  
2 could provide any evidence of discriminatory intent?

3 A Yes, I did. And, in particular, I looked at two things.  
4 One is a comparison of the law, the voter ID part of the law,  
5 with voter ID laws in other states, Texas, Georgia, Indiana,  
6 and what I called in the report the first version of H.B. 589  
7 and the second version of H.B. 589. And the conclusion there  
8 was that the law that was finally passed was more restrictive  
9 of the suffrage than the Texas law, than the Indiana law, than  
10 the Georgia law, and than the law that was first proposed and  
11 debated and discussed and passed by the House.

12 So if you look at the text of the law, you can see that  
13 this was a very restrictive law and that the legislature,  
14 having been given the opportunity to adopt less restrictive  
15 laws, adopted the most restrictive law that it could.

16 The second thing that I looked at was amendments that were  
17 proposed and rejected; and the one that's perhaps most  
18 interesting, in light of more recent events, is the rejection  
19 of what might be called the South Carolina law or provision.  
20 There was an amendment proposed by, I think, Representative  
21 Glazer, and it was rejected in the House at the time. They  
22 could have adopted a bill which was quite similar to what they  
23 finally adopted in 2015, but they rejected it, and they  
24 rejected the vast majority of the major amendments that were  
25 offered by opponents of that law.

1 And, of course, they rejected all efforts to eliminate the  
2 other provisions of the law which came into the bill after the  
3 *Shelby County* decision came down.

4 **THE COURT:** Ms. Riggs, if this is a good time to take  
5 a break, maybe we'll take our morning --

6 **MS. RIGGS:** I have less than ten minutes, but we can  
7 take a break.

8 **THE COURT:** Let's do that. We'll take a 20-minute  
9 break then, and then we'll come back.

10 (The Court recessed at 10:43 a.m.)

11 (The Court was called back to order at 11:07 a.m.)

12 **BY MS. RIGGS**

13 Q Dr. Kousser, we were talking about factors relevant to  
14 whether or not a law may have been motivated by discriminatory  
15 intent. Did you analyze whether the State policies and  
16 institutional rules followed during the House Bill 589  
17 legislative procedure gave any indication of the intent behind  
18 the law?

19 A I did.

20 Q And what did you find?

21 A Well, the -- there are legislative rules and then there  
22 are legislative normals. And so far as I know, no legislative  
23 rules were infringed upon by the passage of H.B. 589, but there  
24 are certainly legislative norms that were set out in a way that  
25 previous legislature, for example, had dealt with an objection

1 in the passage -- to the passage of an election law.

2 The legislature had been considering one of the laws of  
3 the early 2000s and there was -- one of the State officials  
4 said, oh, there was terrible fraud and I have evidence of dead  
5 people voting, et cetera, et cetera, et cetera, and you must  
6 take this into account. And the legislature was scheduled to  
7 start debating the issue something like 45 minutes later, and  
8 they -- he asked that the legislature not consider it at that  
9 point but hold legislative hearings on it. They did so and  
10 they held legislative hearings and only considered the bill  
11 finally two weeks later after the concerns about fraud had  
12 largely been dissipated.

13 In the consideration in 2013 about the voter ID bill, at  
14 the beginning of the legislative session, Speaker Tillis and  
15 Mr. Lewis, the chairman of the House Elections Committee, held  
16 a press conference and went through and said --

17 **MR. FARR:** Objection, Your Honor.

18 **MS. RIGGS:** Your Honor, this is, you know, part of  
19 the materials that he has been relying on for his expert  
20 opinion, but it is also part of the PI stipulation, the  
21 public -- the transcript of the press event that Speaker Tillis  
22 and Representative Lewis had announcing the legislative process  
23 for the earlier version of House Bill 589.

24 **THE COURT:** All right. I am going to allow him to  
25 testify. I am just going to reserve on what weight I am going

1 to give it.

2           **MR. FARR:** Can we just have a standing objection to  
3 the newspaper article so as not to disrupt --

4           **THE COURT:** One of the concerns I have is -- I  
5 flipped through his report over the break, and there are all  
6 sorts of footnotes and references to newspaper articles, some  
7 without quotations, and I have no idea to what extent there is  
8 an objection and to which one of those. And so it would help  
9 me to know exactly what parts are being objected to and what  
10 aren't. So I am going to ask you to object, at least for now,  
11 to what you have objections to.

12           **THE WITNESS:** In this particular example, I saw the  
13 video of them saying what they did, and they said that this was  
14 going to be a fair and open process, they were going to have  
15 hearings, the opponents were going to be allowed to speak, to  
16 offer amendments and so on; and they did so.

17           There were legislative hearings. There was a full  
18 and relatively open debate, and I took that to be a legislative  
19 norm that they thought was important enough to announce, which  
20 was important for the passage of H.B. 589 in the House. That  
21 seemed to be the mode or procedure that they wanted to adopt.  
22 And then after *Shelby County*, everything changed.

23           **MS. MURPHY:** Your Honor, may I hand up an exhibit?

24           **THE COURT:** Yes.

25           **MS. RIGGS:** This is Plaintiffs' Exhibit 418. And may

1 I hand a copy to the witness?

2 **THE COURT:** Yes.

3 **BY MS. RIGGS**

4 Q In the course of your work on this case, did you have the  
5 opportunity to review emails produced by the legislature  
6 relating to the passage of House Bill 589?

7 A Yes.

8 Q Is this one of those emails?

9 A Yes.

10 Q And does this email -- is it an email from Harry Warren to  
11 Nancy Evans on July 24 stating, "Please remember, however, the  
12 bill has not yet come to the House for concurrence. I am sure  
13 some changes will be made in a conference committee on that and  
14 several other aspects of the bill."

15 Did I read that correctly?

16 A Yes.

17 Q What -- how did reading this email affect your findings  
18 with regard to the abrogation of norms in this case?

19 A It was one more piece of evidence that norms were  
20 abrogated. This is what he said typically happened. I am sure  
21 changes will be made in a conference committee because changes  
22 are often made in conference committees, and he was assuring  
23 Ms. Evans that the same sorts of procedures would be followed  
24 as usually were followed, and he expected to see changes.

25 Q Were there changes in conference committee with House

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 Bill 589?

2 A No.

3 **MS. RIGGS:** Your Honor, Plaintiffs move for admission  
4 of Plaintiffs' Exhibit 418.

5 **THE COURT:** Any objection?

6 **MR. BOWERS:** No objection.

7 **THE COURT:** Admitted.

8 **BY MS. RIGGS**

9 Q Finally, Dr. Kousser, can you explain how the anticipated  
10 outcome of House Bill 589 ought to be factored into an analysis  
11 of the intent behind it?

12 A Yes. If you are trying to analyze why people did  
13 something, if there is some sort of public record that  
14 indicates what a reasonable person in that circumstance would  
15 anticipate would be the effects of the action, then that is  
16 relevant to an analysis of why they took that action; and there  
17 was an extensive public record in this case as to the  
18 anticipated effects of the passage of various provisions of  
19 H.B. 589.

20 Q Was that evidence in transcripts of committee debates?

21 A It was in transcripts of committee debates. It was things  
22 that were said on the floor. It was State Board of Elections  
23 reports. It was reports from a group called Democracy North  
24 Carolina, which were discussed in the press, which were  
25 discussed on the floor, and in committee meetings. There were

1 lots of sources of this, not only in newspapers, but newspapers  
2 as well.

3 Q So the disparate impacts of the provisions of H.B. 589  
4 were publicly known and discussed prior to passage of the bill?

5 **MR. BOWERS:** Objection.

6 **BY MS. RIGGS**

7 Q Based on your review of all the evidence?

8 **THE COURT:** I will sustain as to the form of the  
9 question. Rephrase the question.

10 **MS. RIGGS:** Absolutely, Your Honor.

11 **BY MS. RIGGS**

12 Q Was -- what was the state of public discussion about the  
13 disparate impact of the provisions of House Bill 589?

14 **MR. BOWERS:** Objection.

15 **THE COURT:** Overruled.

16 **THE WITNESS:** A good example is the disparate impact  
17 expected from the voter ID portion of 589 as originally passed  
18 in 2013. There was a matching study by the State Board of  
19 Elections which found that something on the order of 320,000  
20 people who were on the current registration rolls had no North  
21 Carolina driver's license or identification card with a photo  
22 on it, and there was a racial breakdown which showed that  
23 blacks were disproportionately likely not to be matched on  
24 voter registration rolls and DMV rolls.

25 There were also studies about the use of same-day



1 registration, which showed that blacks were more likely to use  
2 same-day registration than whites, and I think I've got some  
3 figures on that in the table in my report. And they were more  
4 likely to use out-of-precinct voting than whites.

5           So these were widely discussed. They were discussed  
6 in hearings. They were discussed on the floor. They were  
7 discussed in newspapers. They were discussed in publicly  
8 available reports.

9 **BY MS. RIGGS**

10 Q Did you look to see if there was evidence in the  
11 legislative record -- in all of the evidence that you reviewed  
12 to see if any justification proffered by the State -- strike  
13 that. Let me start over.

14 Did you examine the record to see if any alternative  
15 hypothesis other than racial discrimination could have  
16 motivated the challenged provisions of House Bill 589?

17 A Yes, I did. If I could explain just for a minute. I  
18 spent a long time trying to think about questions of  
19 objectivity in expert witnessing and published a couple of  
20 articles on that in the 1980s and 1990s. One with, if the  
21 Court will excuse me, the provocative title "Are Expert  
22 Witnesses Whores?"

23 I am conscious enough of this so that I try in this, as in  
24 all of my scholarly work, to put my thesis at risk, to use a  
25 phrase that a friend once used who is an economic historian.

1 So in order to put my thesis at risk, I have to look at the  
2 evidence. I have to give all of the sources for the evidence  
3 so that anybody who is reading it, a report or a scholarly  
4 paper, can figure out exactly why I came to the conclusion that  
5 I did and what the evidence for that conclusion is, and I have  
6 to test alternative hypotheses.

7 I have done so in every case that I've testified in. If  
8 you look at *Colorblind Injustice*, there are five chapters that  
9 come out of case testimony. In all of those, I looked at  
10 alternative hypotheses and tried to weigh the evidence for them  
11 versus the evidence of racially discriminatory intent, and I  
12 did so in this case.

13 Q Based on your review of the evidence, does voter fraud  
14 hold up as an alternative hypothesis for -- addressing voter  
15 fraud, does that hold up as an alternative hypothesis for  
16 explaining the bill?

17 A It does not. There was a lot of talk about voter fraud,  
18 but the objective evidence that was presented most clearly is  
19 from a State Board of Elections study, which showed that from  
20 2000 through 2013 -- 2012, I believe, there were only two cases  
21 prosecuted for in-person voting fraud, which would have been  
22 affected by the voter ID bill.

23 There were something on the order of 21 million votes  
24 cast. That makes it seem very unlikely that real proven voter  
25 fraud was a reason for the adoption of the bill. There is

1 plenty of other evidence, which I detail in the report, but as  
2 one piece of evidence, that seems to me telling.

3 Q Based on your review of the evidence, what about the  
4 alternative explanation that the bill was motivated by an  
5 attempt to increase confidence in elections?

6 A Well, this was discussed most prominently by  
7 Speaker Tillis at the beginning of the legislative session,  
8 beginning of the discussion of voter ID, but it was actually  
9 surprising to me that there was so little testimony about this.  
10 If you look at the hearings and you look at the debates and  
11 even if you look at the discussions in the newspapers, there  
12 was very little testimony about this, very little evidence of  
13 it.

14 Nobody got up and said, I didn't vote because I lost  
15 confidence in elections, because I thought there was fraud, and  
16 here are X number of other people who didn't vote. In fact,  
17 voter turnout was at a record high, very little evidence that  
18 this could possibly have been a legitimate explanation. So I  
19 rejected that.

20 Q Dr. Kousser, after reviewing all of this evidence we've  
21 discussed and applying the analytical methodology you developed  
22 and described for the Court here today, what did you conclude  
23 was the intent behind the legislation?

24 **MR. BOWERS:** Objection, Your Honor.

25 **MS. RIGGS:** Your Honor, Dr. Kousser has --



1 on lots of other sources; but, yes, I relied on newspaper  
2 reports.

3 Q And isn't it true, Dr. Kousser, that you did not  
4 independently verify any of the facts that were reported in  
5 those news articles?

6 **MS. RIGGS:** Objection, mischaracterizes earlier  
7 testimony. He explained he did verify.

8 **THE COURT:** Overruled.

9 **THE WITNESS:** I gave one example, but there are other  
10 examples. I mean, the newspapers would report what's in the  
11 State Board of Election reports; and I looked at the State  
12 Board of Elections reports, and it said the same thing that the  
13 newspapers said.

14 To the extent that anything could be verified or  
15 cross-verified by looking at other newspapers or looking at  
16 hearings or looking at things that were said on the floor that  
17 were reported in the debates, I looked at all of the sources  
18 that I possibly could and cross-questioned them.

19 **BY MR. BOWERS**

20 Q To you, that constitutes independent verification?

21 A Certainly it is independent verification to look at what's  
22 in the newspapers and then to see what's in the hearings. If  
23 they quoted -- if the newspapers quoted people in the hearings  
24 correctly, that seems to me independent verification.

25 Q Dr. Kousser, just a few moments ago you testified

1 regarding objectivity of expert witnesses. Do you recall that?

2 A Yes.

3 Q It's fair to say, is it not, that you were and are an  
4 advocate for the practices that were eliminated by H.B. 589;  
5 correct?

6 A I would be in favor of having same-day registration in  
7 California. I would be in favor of out-of-precinct voting, and  
8 we have early voting in the same way. These practices make it  
9 possible for more people to vote, and I would be in favor of  
10 those. That does not affect what I decided in my analysis  
11 here. If all I had been doing was saying, hooray for things  
12 that I was in favor of, then I wouldn't have written a  
13 60-odd-page report and put all the footnotes in.

14 I tried to make very clear why I came to the conclusions  
15 that I do, and those conclusions are separate from whatever I  
16 am in favor of in the way of election returns or election  
17 rules.

18 Q Ms. Riggs also asked you about voter fraud. Do you recall  
19 that?

20 A Yes.

21 Q It's true, Dr. Kousser, that you don't know the procedures  
22 that are available, if any, to a poll worker in North Carolina  
23 to determine if a person who checks in to vote is impersonating  
24 another voter, do you?

25 A I think we went over this in deposition.

1 Q We did.

2 A And I am not completely aware of all the procedures that  
3 would be taken into account; that's correct.

4 Q Okay. And you've never yourself investigated voter fraud,  
5 have you?

6 A That's actually not true. I have come to inferences about  
7 voting fraud. For example, in North Carolina in 1900, when the  
8 amendments providing for a literacy test and poll tax were  
9 adopted in the referendum, I looked -- I tried to estimate the  
10 proportions of blacks and whites who voted for that amendment,  
11 and it seemed to me entirely implausible that 100 percent of  
12 the blacks that had voted would have voted in favor of  
13 disenfranchising themselves.

14 The same thing was true in Alabama in the 1901 referenda,  
15 the referendum on calling a constitutional convention and  
16 another referendum on passing that constitutional convention.  
17 I looked at the election returns. They were entirely  
18 implausible, and I came to the conclusion that there was  
19 considerable voter fraud.

20 I did the same thing with regard to some reconstruction  
21 elections in other -- in other cases. So, yes, I looked at  
22 that sort of thing in the past.

23 Q Dr. Kousser, I am not referring to -- and maybe my  
24 question was inartful, so let me try again. I'm not referring  
25 to historical analyses. I'm asking you: Have you ever

1 participated in an active investigation of voter fraud?

2 A I'm sorry, why does an historical analysis not qualify  
3 under that?

4 Q Because I'm asking about then existing allegations and  
5 investigating those. Have you been a part of any team doing  
6 that?

7 A For current --

8 Q Yes, sir.

9 A -- voting fraud? No, I have not.

10 Q Thank you. Do you know how many investigators have been  
11 hired in the past by the State Board of Elections in North  
12 Carolina to investigate fraud?

13 A No.

14 Q Do you know what the past budgets are for the State Board  
15 of Elections to investigate fraud that the General Assembly has  
16 allocated?

17 A No.

18 Q Dr. Kousser, I want to turn to your expert report that's  
19 already been admitted. Do you still have that in front of you?

20 A I do.

21 Q That's Exhibit Number 46, for the record.

22 First, let's look at Table Number 2 that you went over  
23 with Ms. Riggs on page 21. Do you see that?

24 A Yes.

25 Q And I am focused specifically on the turnout increased



1 numbers among African-Americans voters in 2008, 2010, and '12.

2 Do you see that?

3 A Yes.

4 Q And there is a significant dropoff in 2010 between '8 and  
5 '12; correct?

6 A Yes.

7 Q I don't want to mischaracterize it, but I think you  
8 testified one of the reasons for that is because of  
9 Presidential elections, correct, and greater turnout generally  
10 in Presidential elections?

11 A Yes.

12 Q Okay. Is it also true that the significant Get Out the  
13 Vote efforts of the Obama campaign also had an impact on  
14 increased African-American registration in '08 and '12?

15 A Yes. I think we discussed this in the deposition, and I  
16 made the point that campaigns, particularly national campaigns,  
17 choose where to spend their limited resources on the basis of  
18 opportunities, and that the changes in laws in North Carolina,  
19 which had made it easier for African-Americans in particular to  
20 vote and which coincided with the increase in black turnout,  
21 attracted the Obama campaign in 2008 to spend more resources to  
22 Get Out the Vote.

23 And I opined that if the laws were reversed and black  
24 turnout could not be expected to be as high in future  
25 Presidential elections, that Democrats and probably Republicans

1 would allocate fewer resources to North Carolina and probably  
2 the Presidential turnout would not have that extra boost.

3 It is the connection between election laws and behavior  
4 that results in changes in political participation, and we  
5 discussed that at some length, I think.

6 Q Dr. Kousser, turn to page 20 and Table 1, please, sir.  
7 And in the first -- the first three lines, 1998, '92, and '96,  
8 do you see that?

9 A Yes.

10 Q Tell me, Dr. Kousser, do you know which party was in  
11 control of the North Carolina legislature in the '90s?

12 A Throughout most of the '90s, it was the Democrats, but I  
13 think that there was some times that the Republicans controlled  
14 at least one house. That may be incorrect.

15 Q In your expert opinion, is it possible that changes from  
16 the '90s to the -- this decade in legislative approach could be  
17 attributable to many factors, including policy differences?

18 A There were certainly policy differences, certainly.

19 Q Okay. Dr. Kousser, when Ms. Riggs was asking you  
20 questions about the legislative process in 2013 as compared to  
21 2011, do you know how much time was left in the legislative  
22 session in 2013 when the current version of H.B. 589 was  
23 introduced?

24 A It was less than a week.

25 Q Okay. Wouldn't less than a week time in a legislative

1 session have a significant impact on the availability of time  
2 to conduct hearings or other legislative efforts?

3 A Yes, but the bill didn't have to be introduced then. It  
4 could -- provisions of the bill had been introduced without  
5 hearings early in the session. I detail this in my report.  
6 They could have held legislative hearings on same-day  
7 registration. They could have held legislative hearings on  
8 out-of-precinct voting. They could have held them on early  
9 voting previous to that point.

10 They had plenty of time to consider these provisions  
11 during the legislative session. They didn't have to put it all  
12 together at the very end.

13 Q Dr. Kousser, in looking -- in doing your intent analysis,  
14 isn't it true that you haven't found any one legislator who  
15 was -- who demonstrated discriminatory intent, did you? As we  
16 sit here today, you can't point to one legislator that had  
17 discriminatory intent?

18 A I tried to look at the whole legislature and to determine,  
19 as objectively as possible, what the intent of the legislation  
20 was. I did not find any smoking guns. Nobody said, I want to  
21 pass this because I want fewer African-Americans to vote. I  
22 don't expect, in a contemporary legislature, to find that sort  
23 of statement. So I was looking at the legislature as a whole.

24 Q Dr. Kousser, back last summer, didn't you agree with me  
25 and Mr. Farr that Congress has not violated Section 2 or the

1 Equal Protection Clause by enacting legislation that gives  
2 states the right to close their registration books 30 days  
3 prior to Election Day?

4 A Yes.

5 Q Isn't it also true that your theory is based on a  
6 retrogression standard?

7 **MS. RIGGS:** Objection, misstating his testimony and  
8 his report.

9 **THE COURT:** Overruled.

10 **THE WITNESS:** It is not based on a retrogression  
11 standard. It is based upon a comparison between the status quo  
12 and what was adopted; and when you are looking at intent,  
13 that's the commonsensical standard. You could call that a  
14 retrogression standard if you wanted to, but you always have to  
15 ask, when you are trying to figure out why something was  
16 passed, what the baseline is, and the natural baseline for  
17 determining what -- why a law was changed is the previous law.

18 If the question was, is a particular practice  
19 demanded by the Constitution, that's a different question and  
20 that's not a question that I addressed.

21 **MR. BOWERS:** Dr. Kousser, thank you for your time. I  
22 think my colleague Mr. Farr may have some on behalf of the  
23 State.

24 **THE COURT:** Mr. Farr?  
25

1 **BY MR. FARR**

2 Q I don't know if I should say good morning or good  
3 afternoon, Dr. Kousser. Thank you for coming today, and it is  
4 good to see you again.

5 I wanted to start off by asking: In your deposition last  
6 year, did you not testify that you thought that black turnout  
7 would drop off if the provisions of H.B. 589 were enacted?

8 A Yes.

9 Q Okay. And do you know if that happened in the 2014  
10 election?

11 A I think that it did not happen just from things that I  
12 heard about in this particular case. But as I pointed out when  
13 I discussed the table, the major rise in black turnout  
14 coincident with the earlier laws took place in Presidential  
15 elections, and we wouldn't expect nearly so much of an effect  
16 in off-year elections.

17 Q Right. I think if we pulled your deposition out, I think  
18 you said that you expected it would drop off in Presidential  
19 years at a higher rate, but that it would still drop off some  
20 in off years; is that correct?

21 A Yes. I think that what I underestimated was the sort of  
22 backlash effect on the part of particularly African-American  
23 organizations, and I certainly didn't anticipate that a senate  
24 race which had more money spent in it than any other senate  
25 race in the history of the country would take place. I just

1 had no idea that that senate race would attract so much in the  
2 way of funds. So ...

3 Q Dr. Kousser, we took your deposition in April, I think --  
4 or June of 2014. At that point in time, did you not testify  
5 that you had given a contribution to Kay Hagan for the 2014  
6 election?

7 A Yes.

8 Q And did we not agree in that deposition that we expected  
9 that the 2014 Senate election in North Carolina would be  
10 competitive?

11 A We did. I didn't think it would attract so much money.

12 Q Okay. And at the time you gave your deposition, you had  
13 not done any sort of cross-state analysis to determine the  
14 effect of turnout on practices like early voting or same-day  
15 registration or out-of-precinct voting?

16 A That's correct.

17 Q All right. Now, I wanted to clarify a few things. In the  
18 *Garza* case in which you testified, did you say you relied upon  
19 65 depositions?

20 A Among other things, yes.

21 Q Did that include depositions of the -- I don't know if  
22 they were city councilmen or commissioners. What were they?

23 A They were members of the county board of supervisors.

24 Q So the people who actually passed the law had their  
25 depositions taken, and that was part of the evidence that you

1 relied upon in *Garza*?

2 A I think one of the supervisors had his deposition taken,  
3 but it was uninformative.

4 Q Okay. But you had that deposition?

5 A Yes. The depositions that were much more informative were  
6 the people who actually did the redistricting.

7 Q Who were the other 65 people that got deposed?

8 A They were legislative aides. There was a redistricting  
9 committee that was appointed, which was -- it turned out --  
10 basically, a shell committee. It had a certain number of  
11 minority members, et cetera, but the committee really didn't do  
12 anything. It was a couple of members who did things, and I  
13 concluded, after all of the material that I read, that they  
14 were sort of queued by legislative aides to the supervisors.  
15 The supervisors -- the legislative aides would say, we want a  
16 line here rather than there, and people would do it.

17 But it's the people who actually did the redistricting  
18 that were most important in the deposition evidence. One of  
19 the depositions was 750 pages long.

20 Q Okay. You didn't have evidence like this to review in  
21 this case, did you?

22 A Just the emails.

23 Q Okay. All right. Now, Dr. Kousser, I think you told me  
24 that at your deposition you've never worked as a poll worker or  
25 an elections board member.

1 A That's correct.

2 Q So have you ever had any experience in counting  
3 provisional ballots?

4 A No.

5 Q Do you know the process that's followed to count an  
6 out-of-precinct provisional ballot in North Carolina?

7 A No.

8 Q Do you know -- when I say "verification of a voter  
9 registration application," would you understand what I was  
10 talking about?

11 A In general, yes.

12 Q Do you know how voter registration applications are  
13 verified in North Carolina?

14 A No.

15 Q Do you know how long it takes a voter registration  
16 application to be verified in North Carolina?

17 A No. I know some things that they do. They try to  
18 verify -- if there is a Social Security number or the last four  
19 digits of the Social Security number or driver's license  
20 number, they look at that, and they send a postcard or a letter  
21 to the voter. I know that they do that.

22 Q But you don't how long the process takes for a  
23 registration application to be verified?

24 A No.

25 Q Are you aware of the fact that if a registration



1 application is unverified, that registration is denied?

2 A I think that is the case.

3 Q And would you also be aware of the fact that if the  
4 registration is denied, that voter would not be able to vote?

5 A I believe it to be the case, but I don't know  
6 specifically.

7 Q Okay. And did you ever study how long it took -- you are  
8 aware of the fact that North Carolina closes their registration  
9 books 25 days before the election?

10 A Yes.

11 Q Did you ever compare the verification rates for people who  
12 register 25 days before the election versus those who register  
13 during same-day registration?

14 A I have not seen figures on that.

15 Q Did you ever look to see if -- what the percentage was of  
16 same-day registration voters who failed to mail their  
17 application after their ballot had been counted?

18 A I have not specifically looked at that.

19 Q You haven't looked at the percentage of what I will call  
20 normal registrants, people who registered 25 days before the  
21 election -- you haven't studied or looked at how often those  
22 individuals fail mail verification after their ballot is  
23 counted?

24 A I have not specifically looked at that.

25 Q I wanted to talk to you about Senator Tillis, who at the

1 time of your report I think was Speaker Tillis.

2 A Yes.

3 Q And Representative Lewis.

4 A Yes.

5 Q And you saw a press conference, you say on video, where  
6 they made some comments?

7 A Yes.

8 Q And you said that the process that they followed was a  
9 fair process. You tell me how you described it. I don't want  
10 to put words in your mouth.

11 A Well, it was certainly a more extensive process, and it  
12 was relatively fair compared to what happened in 589  
13 eventually.

14 Q Okay. But they were members of the North Carolina House?

15 A Yes.

16 Q Did you ever see any press conferences or things on TV  
17 about statements by Senator Berger, who was the President Pro  
18 Tem of the House, explaining how he was going to conduct the  
19 process on the Senate side?

20 A I can't remember looking at -- there may have been  
21 descriptions in hearings or other reports, but I don't remember  
22 seeing anything on video.

23 Q All right. And do you know whether or not the rules in  
24 the Senate and the House may be different?

25 A I'm sure they are different. They are different in every

1 legislature like that.

2 Q Now, you talked about this email. I think it was in  
3 Exhibit 418. Do you still have that with you?

4 A I do.

5 Q Where there was a reference by Representative Warren about  
6 the conference committee?

7 A Yes.

8 Q Did you study anything about other conference committees  
9 and how they operated in North Carolina during the 2013  
10 legislative session?

11 A I read some descriptions, but I did not make any extensive  
12 study.

13 Q Right. Do you know whether or not the Congress committees  
14 always make amendments, or do they sometimes just pass the bill  
15 as it's been presented from one house or the other?

16 A I am sure they sometimes just pass the bills.

17 Q In studying the North Carolina photo ID bill, were you  
18 aware that there was a rollout period for that bill that --  
19 when it was enacted in the summer of 2013, and it was not  
20 intended to come into effect until January of 2016?

21 A It did not come fully into effect until that point, yes.

22 Q The photo ID requirement would not come into effect until  
23 2016; right?

24 A Fully. There was a sort of mock photo ID. People would  
25 be told in 2014 that if they could show their photo -- asked if

1 they could show their photo ID, but it wouldn't be required to  
2 vote.

3 Q So no one was required by North Carolina to offer a photo  
4 ID to vote in elections that had been held up to this point in  
5 time?

6 A That's correct.

7 Q All right. Now, did you -- I am going to refer to the  
8 period of time from when the bill was enacted to when voters  
9 will be required to have a photo ID as a rollout period. Will  
10 you accept that?

11 A Okay.

12 Q Did you ever check to see any other states and the types  
13 of rollout periods they had for their photo ID requirements?

14 A I looked at other states, and they were required quickly.  
15 They didn't have an intervening election before they were  
16 required to go into effect.

17 Q Okay. So North Carolina had, as far as you know, the  
18 longest rollout period of any state that has enacted a photo ID  
19 bill?

20 A As far as I know. I have not looked in detail at Alabama,  
21 Mississippi, Arkansas, Wisconsin, et cetera.

22 Q Do you recall that the photo ID statute required the State  
23 to engage in an educational campaign to advise voters of the  
24 photo ID requirement that would come into place in 2016?

25 A I was aware of that. I was also aware of the cutdown of

1 the publicity campaign which had been promised in the first  
2 version of 589. The last version of 589, that was drastically  
3 reduced, but I was aware that there was to be a campaign of  
4 public information.

5 Q Well, the final version of the bill had almost a  
6 two-and-a-half-year rollout period; correct?

7 A That's correct.

8 Q And it also required an educational campaign for voters?

9 A Yes.

10 Q Did you ever compare the education campaign that North  
11 Carolina required its State Board of Elections to engage in to  
12 any other educational campaign by any other state that adopted  
13 a photo ID bill?

14 A I am aware of what was available in Georgia. I am aware  
15 of what was available in Texas. Those seemed basically to me  
16 to be comparable.

17 Q Can you recall any specifics to explain why they were  
18 comparable?

19 A There was a good deal of money spent. Certainly in  
20 Indiana, there was a good deal of money spent to try to inform  
21 voters of exactly what they needed, and that became an issue in  
22 the *Crawford* case, I think.

23 Q But the time period of the educational campaign in North  
24 Carolina was longer than any of the other states?

25 A Absolutely.

1 Q Now, in your deposition, Dr. Kousser, we went over a  
2 summary of the legislative history for H.B. 589. Do you  
3 remember that?

4 A Yes.

5 Q And do you remember admitting that, as far as you were  
6 aware, that no Democratic member of the General Assembly ever  
7 made a point of order arguing that the rules had been violated?

8 **THE COURT REPORTER:** I'm sorry.

9 **MR. FARR:** I'll start again.

10 **THE COURT REPORTER:** Thank you.

11 **MR. FARR:** I have only lived here for 30 years, so  
12 I've still got a little bit of Ohio in me. I apologize.

13 **BY MR. FARR**

14 Q Do you remember admitting during your deposition that  
15 during the legislative process that not a single Democratic  
16 member made a point of order arguing that the rules of either  
17 the House or the Senate had been violated?

18 A Yes.

19 Q Do you recall that you had admitted that the Senate held a  
20 committee hearing where members of the public were entitled to  
21 speak?

22 A Yes.

23 Q Do you remember admitting that under the Senate rules,  
24 there was no requirement that the Senate allow members of the  
25 public to speak?

1 A Yes.

2 Q Do you recall admitting that there were several amendments  
3 offered by Democratic members that were ultimately incorporated  
4 into the final version of 589?

5 A Yes. Except for one, I think they were pretty minor  
6 amendments.

7 Q Do you remember an amendment by Senator Stein where the  
8 majority accepted a proposal that the number of hours for early  
9 voting be maintained at their prior levels?

10 A That was the exception I was referring to.

11 Q Do you think that was a minor exception?

12 A I said except for that. That -- it is an interesting  
13 exception. It's, as I understand it, something that required  
14 county by county, each county to have the same number of hours  
15 that they had had previously, and it allowed for -- under  
16 agreement from the local board of elections, it allowed  
17 exceptions in each county so that a large number of counties  
18 didn't have to maintain the same number of hours. My  
19 understanding is that that was not in the original amendment,  
20 but that that was what passed.

21 Q Did you study the actual hours of early voting that were  
22 held in 2013 to determine if there had been a significant  
23 cutback as compared to 2010?

24 A No.

25 Q Did you study how many early voting locations there were

1 in North Carolina in 2014 as compared to 2010?

2 A No.

3 Q Did you study how many evening hours were available to  
4 voters in 2014 as compared to 2010 for early voting?

5 A No.

6 Q Did you study how many weekend hours were available for  
7 early voters in North Carolina in 2014 as compared to 2010?

8 A No.

9 Q Getting back to your deposition, Dr. Kousser, do you  
10 recall that you did not dispute that the redistricting plan  
11 that was enacted in 2003 was enacted without any public  
12 hearings? Do you remember that?

13 A I didn't dispute it, but I didn't study it. So I accepted  
14 your characterization of it.

15 Q You didn't look at how the 2003 redistricting bill was  
16 handled; is that right?

17 A That is correct.

18 **MR. FARR:** I think that's all, Your Honor. Thank  
19 you.

20 Thank you, Dr. Kousser.

21 **THE WITNESS:** Thank you, Mr. Farr.

22 **THE COURT:** Any redirect?

23 **MS. RIGGS:** Very briefly, Your Honor.

24 REDIRECT EXAMINATION

25 **BY MS. RIGGS**



1 Q Mr. Farr asked you questions about what it takes to count  
2 out-of-precinct provisional ballots, what it takes for poll  
3 workers to do that. Do you recall that question?

4 A Yes.

5 Q Was there debate during the legislative committee meetings  
6 or on the floor justifying the repeal of out-of-precinct  
7 provisional voting on that basis?

8 A I don't know of any.

9 Q And you reviewed all of those transcripts?

10 A Yes.

11 Q And I am looking at your report, page 44. Was the  
12 contemporaneous evidence at the time that the confirmation  
13 by-mail rate of same-day registration and earlier registration  
14 was approximately equal?

15 A Yes.

16 **MS. RIGGS:** No further questions.

17 **MR. FARR:** Would you mind if I just look at page 44  
18 for a second? I may have no further questions.

19 **THE COURT:** That will be fine. Hold on just a  
20 minute.

21 **MR. FARR:** I do have one question -- or a couple of  
22 questions, Your Honor.

23 **THE COURT:** All right.

24 RECROSS-EXAMINATION

25 **BY MR. FARR**

1 Q This is redirect on Exhibit 46, Dr. Kousser. Ms. Riggs  
2 referred you to on page 44, footnote 132, and that's a  
3 newspaper article from *The News & Observer* dated July 1, 2001.

4 A Yes.

5 Q And that's the source you are relying upon to make the  
6 testimony that you gave Ms. Riggs?

7 A Yes.

8 Q And that footnote doesn't say anything about the  
9 percentage by which same-day registrants failed mail  
10 verification after they voted, does it?

11 A No.

12 **MR. FARR:** Thank you.

13 **THE COURT:** Hold on just one minute, please, sir. I  
14 have a few questions for you.

15 Over the time that same-day registration and early  
16 voting and out-of-precinct were in effect, which is roughly  
17 2000 through 2013, do you know approximately how many people by  
18 race used those procedures, dividing it into African-American  
19 versus everyone else?

20 **THE WITNESS:** I believe that's in the report. I am  
21 not sure exactly where, but I believe that the early voting --  
22 the figures on early voting by race and the figures on same-day  
23 registration by race are in the report. So I did know that.

24 **THE COURT:** As I understand the evidence, it's the  
25 proportionality of use that was disproportionately

1 African-American as to those procedures. Is that accurate?

2 **THE WITNESS:** That's correct.

3 **THE COURT:** Were there, nevertheless, hundreds of  
4 thousands, if not millions, of nonAfrican-Americans who used  
5 those procedures over that period of time?

6 **THE WITNESS:** Yes.

7 **THE COURT:** How do you take that into account when  
8 you examine factors for racial intent; that is, that the repeal  
9 of these procedures affected large numbers of  
10 nonAfrican-Americans?

11 **THE WITNESS:** Well, to give you an example, I  
12 recalled the proportions of early voting. I think in 2012, it  
13 was roughly 70 percent of African-Americans used early voting  
14 and roughly 50 percent of whites. And the question is  
15 disproportionality. To use -- if you will excuse me and go  
16 back to being an historian of the 19th Century. After the  
17 passage of the Fifteenth Amendment, states could no longer say  
18 blacks couldn't vote. So they had to choose some quality of  
19 blacks that disproportionately affected blacks, and so one of  
20 them was wealth or income, another was illiteracy, property  
21 holding, or the grandfather clause, the classic one, they asked  
22 has your grandfather fought in a war.

23 Blacks were disenfranchised in lots of southern  
24 states because they chose a characteristic which blacks  
25 disproportionately had. They were disproportionately

1 illiterate. They were disproportionately poor. And they made  
2 that a qualification. On the face of it, it's not a racial  
3 qualification. It is just a qualification for property or  
4 illiteracy.

5           The same is true here. The North Carolina  
6 legislature chose a qualification or a rule which was  
7 disproportionately used by blacks, and they repealed that rule.  
8 They changed that rule.

9           Just as I concluded that there was a racially  
10 discriminatory intent in the adoption of a poll tax or a  
11 literacy test because blacks were disproportionately poor and  
12 illiterate, I conclude that there was a racially discriminatory  
13 intent in the adoption and the repeal of early voting because  
14 blacks disproportionately used that.

15           **THE COURT:** In many of the prior cases that you  
16 referred to, there is the institution of some type of  
17 restriction that makes it harder for someone of color to  
18 vote --

19           **THE WITNESS:** Yes.

20           **THE COURT:** -- whether it is a poll tax or a literacy  
21 test or something along those lines. In this case, as to those  
22 three items that I mentioned, the early voting, same-day  
23 registration, out-of-precinct ballots, some could argue those  
24 don't quite fit the normal model of a restriction; they were an  
25 additional mechanism allowing people to vote, making it easier

1 to vote. At least that argument has been made, okay.

2 So are there any other cases you've found in your  
3 research over your career where there is some elimination of a  
4 voting mechanism like the three I mentioned in this case that  
5 might not fit the classic restriction category?

6 **THE WITNESS:** Well, consider the sort of classic  
7 Section 2 case where -- or things that brought about the  
8 original passage of Section 5. The first time that Section 5  
9 was validated by the Supreme Court in regard to an election  
10 structure was in Allen in 1969. And in Allen, after blacks  
11 started voting in Mississippi -- four of the five cases were  
12 from Mississippi, one of the cases from Virginia -- the  
13 legislature changed the election structure to -- from a  
14 single-member district system, or an elective system, to an  
15 at-large system, or an appointive system. Both those made it  
16 more difficult for blacks to elect candidates of their choice;  
17 in fact, in the appointive choice, to elect candidates at all.

18 And the conclusion was that those were racially  
19 discriminatory, and most of the voting law since 1969 has been  
20 based on such changes in electoral procedures or there have  
21 been attempts to make it easier to -- or to require the use of  
22 single-member districts. I think that's analogous to the sorts  
23 of changes that took place in North Carolina.

24 **THE COURT:** All right. Does anybody have any  
25 questions in light of my questions?

1           **MS. RIGGS:** Just one, Your Honor.

2           **BY MS. RIGGS**

3           Q     Dr. Kousser, are you aware of situations in Florida where  
4     the use of punch ballot machines were found to have a racially  
5     disparate effect on voters of color?

6           A     Yes.

7           Q     And can you explain how that might be analogous to the  
8     current situation in response to what Judge Schroeder asked?

9           A     Well, in those cases, there were -- the punch cards were  
10    used disproportionately in counties where blacks were more  
11    concentrated, and there were more errors in punch cards than  
12    there were in the direct recording of vote and other ways of  
13    voting, and Courts have taken that into account in assessing  
14    whether that was racially discriminatory.

15          Q     And the use of a punch card machine isn't a restriction,  
16    per se?

17          A     No.

18                **MR. FARR:** Your Honor, I have a few questions.

19                **THE COURT:** All right, Mr. Farr.

20           **BY MR. FARR**

21          Q     Dr. Kousser, in response to the judge, you talked about  
22    how states went from single-member districts to multi-member  
23    districts, which essentially submerged the black voters in  
24    multi-member districts so they could not elect a candidate of  
25    choice; is that correct?

1 A Yes.

2 Q That was an action that the states took, and there was  
3 nothing the black voter could do to really get around that,  
4 could they?

5 A That's correct.

6 Q Punch cards, if the State gives you a punch card to vote  
7 on, that's what you got to vote on; right?

8 A That's correct.

9 Q All right. H.B. 589, is there anything that the State has  
10 done here to stop African-Americans from registering to vote 25  
11 days before the election?

12 A No.

13 Q Is there anything that the State has done here to stop  
14 African-Americans from voting during the ten days of early  
15 voting?

16 A No.

17 Q Is there anything the State has done here to stop voters  
18 from going to the right precinct?

19 A No.

20 **MR. FARR:** That's all, Your Honor.

21 **THE WITNESS:** Just as -- if I may expand a bit? Just  
22 as blacks could have gotten enough money to pay a poll tax.  
23 They could, after a period of years, have become literate.  
24 They could gain property. Over a period of time, they could  
25 have done all of those things.





1 A -- G-U-M-P.

2 **THE COURT:** She doesn't need to read over her. Don't  
3 worry about what's on her screen. It's in a certain code. You  
4 just answer the questions just as clearly as you can.

5 **THE WITNESS:** I am going to try to do my best.

6 **BY MR. BROOK**

7 Q Where were you born?

8 A Durango, Mexico.

9 Q How long have you lived in the United States?

10 A Twenty-one years.

11 Q Where have you lived in North Carolina?

12 A I lived in Autryville, North Carolina and now I live in  
13 Salemburg.

14 **THE COURT:** What was the first name?

15 **THE WITNESS:** Autryville.

16 **MR. BROOK:** Would it be helpful for her to spell  
17 that, Your Honor?

18 **THE COURT:** No, I think we can go forward. I am  
19 going to let you lead, though.

20 **BY MR. BROOK**

21 Q Are you a citizen of the United States?

22 A Yes.

23 Q When did you become a citizen?

24 A I become a citizen on July 30 of last year.

25 Q So you became a citizen July of last year?

1 A Yes.

2 Q July of 2014. And prior to becoming a citizen, what was  
3 your immigration status?

4 A Permanent resident. I was a permanent resident.

5 Q How long had you been a permanent resident?

6 A Since January 1994.

7 Q And can you tell me a little bit about your work history  
8 since you've lived in North Carolina.

9 A I was a farm worker and then I started working on Head  
10 Start, migrant and Head Start.

11 Q First, you were a migrant worker; is that correct?

12 A Yes.

13 Q And then you worked with Head Start; is that right?

14 A Yes.

15 Q Can you tell me what you did with Head Start?

16 A I was a senior aide first, and then I was a teacher  
17 assistant, and then I began to be a teacher. You want me to  
18 describe what I do?

19 Q Absolutely. Please do.

20 A I work with two years to three, and we help them to be  
21 independent, like eating by themselves, talk, to sharing toys,  
22 take turns.

23 Q So you were with Head Start working with very young  
24 children, toddlers, on eating, socializing, interacting with  
25 one another; is that correct?

1 A Yes, sir.

2 Q How long did you work with Head Start?

3 A Twenty-one years.

4 Q So more than two decades with Head Start?

5 A Yes.

6 Q Can you tell me about your education history since you  
7 have lived in North Carolina?

8 A Well, I got my GED. Then I get my -- I start to getting  
9 my associate's degree and I get -- I finished last year on May,  
10 my associate's degree in early childhood.

11 Q So you got your associate's degree in early childhood in  
12 2014; is that correct?

13 A Yes.

14 Q Why did you pursue your associate's degree in early  
15 childhood?

16 A Because I work with children.

17 Q So you're pursuing the associate's degree related to your  
18 work with Head Start; is that right?

19 A Yes.

20 Q When did you first register to vote, ma'am?

21 A October the 7th, 2014.

22 Q So October of last year is when you first registered to  
23 vote?

24 A Yes.

25 Q How did you come to register to vote?

1 A I went to get my driver's license, my CDL.

2 Q Let me stop you right there. Your CDL. What is a CDL?

3 A Commercial driver's license.

4 Q Why were you pursuing a commercial driver's license?

5 A Because where I work, sometimes they need a bus driver  
6 to -- for -- to take the childrens for field trips, to doctor's  
7 appointments for the family.

8 Q So you pursued your commercial driver's license as part of  
9 your responsibilities with Head Start; correct?

10 A Correct.

11 Q Go on about how that relates to you registering to vote.

12 A Well, when I went to get my driver's license, the lady  
13 asked me if I want to register to vote, and I say yes. Then  
14 she give me a piece of paper to sign and she asked me what  
15 party I wanted to be, and I answer I don't know because it is  
16 going to be my first time to vote. And she said she was going  
17 to put me unaffiliate.

18 **MR. MCKNIGHT:** Your Honor, we just object to hearsay  
19 to the extent that she is testifying about what she was told at  
20 DMV to the extent that it goes to anything other than actions  
21 that she later took.

22 **THE COURT:** All right. Sustained for now.

23 **MR. BROOK:** Again, this is not being offered for the  
24 truth of the matter asserted, but simply her understanding of  
25 the interaction.

1 **BY MR. BROOK**

2 Q What DMV did you go to?

3 A Clinton, North Carolina.

4 Q So you went to the DMV in Clinton, North Carolina, to get  
5 your commercial driver's license?

6 A Yes.

7 Q While there, they asked you about registering to vote;  
8 correct?

9 A Yes.

10 Q And when did you go to the Clinton DMV and register to  
11 vote?

12 A It was October 7.

13 Q Of what year?

14 A 2014.

15 Q So just before -- it was October of 2014, last year?

16 A Yes.

17 Q So just before the election of last year?

18 A Yes.

19 Q Did you believe as a result of registering in October --  
20 on October 7, 2014 that you would be able to vote in  
21 November 2014?

22 A Yes, she told me I was registered on time to vote last  
23 year.

24 Q Who told you that?

25 A The lady.

1 Q The lady at DMV?

2 A Yes.

3 Q Okay. Did you want to vote in the November 2014 election?

4 A Yes.

5 Q Why did you want to vote in that election?

6 A It was one of my rights after I become a citizen.

7 Q And did you attempt to vote in the November 2014 election?

8 A I went on October 29 to vote.

9 Q And so that was during the early voting period; correct?

10 A Yes.

11 Q Where did you go on October 29, 2014, to vote?

12 A I went to Lakewood High School in Salemburg.

13 Q So you went to Lakewood High School in Salemburg in an  
14 effort to vote on October 29; correct?

15 A Yes.

16 Q Can you tell me about what happened when you went to  
17 Lakewood High School on that date to vote?

18 A Well, I was ready to vote. I was in line. When they  
19 asked my name, I tell them my name, and they say I wasn't on  
20 the list. And they sent me to a different line with another  
21 person, and he say he was going to make phone calls to make  
22 sure I was on the list. And he asked me if I was sure I  
23 registered to vote, and I said yes. I stayed around two hours  
24 over there, and they never find my name on the list. And he  
25 offered me a provisional ballot.

1 Q Let me make sure -- I want to go through piece by piece  
2 and make sure I fully understand what happened here. So you  
3 show up at Lakewood High School, and you're in one line; is  
4 that correct?

5 A Yes.

6 Q You tell someone when you get to the front of that line  
7 your name; correct?

8 A Yes.

9 Q And they cannot find your name on the voting roll at that  
10 point; is that accurate?

11 A Yes.

12 Q At that point, they move you over to another line?

13 A They send me to another line.

14 Q And at this point, did they -- they can't find your name  
15 again when you are in this second line; is that right?

16 A Correct.

17 Q And the person who -- who are you speaking with? Do you  
18 know who you were speaking with?

19 A It was another man. I don't know his name.

20 Q So was it someone associated with Lakewood High School  
21 polling place?

22 A Yes.

23 Q And did he go away at some point to make a phone call?

24 A No, it was beside me.

25 Q He did it right in front of you?

1 A Yes.

2 Q He could not determine that you were on the voting rolls  
3 based on that phone call is your understanding; correct?

4 A Yes, he say my name is nowhere.

5 Q And this entire process, being shuffled between lines and  
6 talking to various people at Lakewood High School, took around  
7 two hours?

8 A Correct.

9 Q You ultimately cast a provisional ballot; correct?

10 A Yes.

11 Q Do you know if that provisional ballot ended up counting  
12 in the November 2014 election?

13 A No.

14 **MR. BROOK:** Thank you very much for your time.

15 **THE COURT:** No, you don't know or, no, it wasn't  
16 counted?

17 **THE WITNESS:** It wasn't counted.

18 **THE COURT:** Any cross?

19 CROSS-EXAMINATION

20 **BY MR. MCKNIGHT**

21 Q Good afternoon again, Ms. Najera. My name is Michael  
22 McKnight. We met last month at your deposition in Clinton.

23 When you went to the DMV office, you said that was  
24 October 7, 2014; is that right?

25 A Yes.



1 Q Did you fill out a voter registration form when you went  
2 to the DMV office?

3 A Yes.

4 Q Did you sign that voter registration form?

5 A Yes.

6 Q And can you describe for me what that form that you say  
7 you signed looked like?

8 A It was a short paper.

9 Q Do you remember anything that it might have had on it?

10 A I really was -- something about -- it was my information,  
11 but it was unaffiliate I remember.

12 Q And you say it was unaffiliate. What do you mean by that?

13 A When she asked me what party I want to be, that is when I  
14 tell her I wasn't sure because it was going to be my first time  
15 to vote.

16 Q And, now, was unaffiliated something that was marked on  
17 the piece of paper that you say you signed, or is that part of  
18 a discussion that you had with the person at DMV?

19 A It was on the paper that I signed.

20 Q And with respect to this piece of paper you say you  
21 signed, what happened to it after you signed -- I guess let me  
22 ask a better question than that.

23 After you signed that piece of paper, what did you do with  
24 it?

25 A I gave it to her.

1 Q Okay. And do you know the name of the person who assisted  
2 you with that piece of paper at the DMV in October of 2007  
3 (sic)?

4 A I do not know her name. I think it was an  
5 African-American lady.

6 Q So she was African-American?

7 A Yes.

8 Q Do you remember when we talked about this incident in your  
9 deposition, I asked you the question: "Did you think that the  
10 fact that you were Hispanic had anything to do with the issue  
11 you had in registering to vote?" And do you remember what your  
12 response to me to that question was?

13 A I say I don't want to think it's because I'm Hispanic, I  
14 don't think.

15 Q So you don't think the fact that you are Hispanic had  
16 anything to do with this issue you had in registering to vote  
17 at DMV?

18 A No.

19 Q Okay. And you are married, aren't you, Ms. Najera?

20 A Yes.

21 Q And is your husband also Hispanic?

22 A Yes.

23 Q And is he registered to vote?

24 A Yes.

25 Q And is he also registered to vote in Sampson County?

1 A Yes.

2 Q Has he been registered to vote a long time in Sampson  
3 County?

4 A From 2000.

5 Q You think around 2000? Ms. Najera, are you registered to  
6 vote now as a result of casting a provisional ballot in October  
7 of 2014?

8 A Yes.

9 Q So you will be able to vote in future elections?

10 A Yes.

11 **MR. MCKNIGHT:** I don't think we have any other  
12 questions at this time.

13 **THE COURT:** Any more redirect?

14 **MR. BROOK:** No, Your Honor.

15 **THE COURT:** Ma'am, you may step down. Thank you.

16 **MR. DONOVAN:** All the witnesses are about an hour.  
17 Do you want to take a break?

18 **THE COURT:** We'll take a break. What's on the  
19 afternoon schedule?

20 **MR. DONOVAN:** It will be additional experts. It is  
21 going to be some Department of Justice experts, more on the  
22 kind of social economic standards and evidence of that.

23 **THE COURT:** Who is that?

24 **MR. DONOVAN:** For Your Honor, there is three  
25 probably. It's Vernon-Feagans, which is going to be by video.

1 Then Summers and Clotfelter. So you may want -- I am sure we  
2 can get you the hard copy.

3 **THE COURT:** I was just concerned whether I am going  
4 to have any other evidentiary issues with respect to any --

5 **MR. DONOVAN:** I don't think there is any motions in  
6 limine related to these three.

7 **THE COURT:** That's good news.

8 **MS. RIGGS:** With regard -- this is the stipulation  
9 that's already been filed with regard to provisional ballots  
10 and whether they counted or not. It's Plaintiffs' Exhibit 678.  
11 May I hand it up, Your Honor?

12 **THE COURT:** Yes. How many other witnesses are there  
13 that have as an issue reliance on a newspaper article or some  
14 out-of-court statement allegedly attributable to a legislator  
15 or some other person that you think is important?

16 **MR. DONOVAN:** I will check over lunch, Your Honor,  
17 but I think it's really Dr. Lichtman, who is our expert,  
18 although I am not even sure he is covering that. He has other  
19 evidence that he is going to cover. The Department of Justice  
20 has an expert. I'm not sure how much -- why don't we confer.

21 **THE COURT:** If you would. We can argue about a lot  
22 of things; but if it's not going to be an issue or if we can  
23 narrow down what the points of contention are, that's always an  
24 easier way to do it.

25 **MR. DONOVAN:** Obviously, it's on your plate, but I

1 think that stipulation issue would really narrow whether or not  
2 we have to deal with other issues.

3           **THE COURT:** I haven't made a decision, but I am a  
4 little concerned about making a decision that the Defendants  
5 are bound in a way that they are saying now they didn't think  
6 they were bound. I had thought the plan was to get people to  
7 agree to what's already in the record, which would mean it is  
8 already in the record.

9           **MR. DONOVAN:** I understand that, although I would ask  
10 that you also consider we relied on that stipulation in not  
11 subpoenaing --

12           **THE COURT:** I understand that.

13           **MR. DONOVAN:** So it goes both ways.

14           **THE COURT:** That then raises a prejudice issue, but  
15 in terms of -- stipulations have to be knowingly entered into,  
16 particularly among lawyers who are professionals, I have a  
17 little bit of concern of having lawyers, who are officers of  
18 the court, tell me that's not what I thought we were agreeing  
19 to and then saying, no, I'm sorry, you are bound to that. So I  
20 have some hesitation to holding them to that, although that is  
21 what I had hoped you all had been working out for reasons that  
22 would affect just this kind of thing.

23           So if I have some hesitation with that, the issue  
24 will become where does that leave you all. It was signed on  
25 the 12th of June. So I don't know where you were with

1 discovery at that point. Maybe the only issue is whether you  
2 could have brought people into the courtroom for trial.

3 So maybe you all can figure out what's really at  
4 stake over lunch or today, whether this is an argument that, in  
5 the abstract, is contentious, but in reality, when you get to  
6 the granular level, it's really only about a few things; and  
7 maybe you can reach some agreement or at least narrow it.  
8 Otherwise, if you then are going to argue prejudice, I will  
9 consider that and whether then you can bring in people and what  
10 we'll do.

11 **MR. DONOVAN:** I think the other issues on our  
12 collective plate on evidentiary -- there were some  
13 late-produced reports by the State filed basically in June,  
14 well after the close of discovery -- I am happy to argue  
15 that -- that we think should be excluded.

16 **THE COURT:** There were late reports produced by the  
17 State arguably. Then there is a late report, arguably,  
18 produced by Dr. Lichtman.

19 **MR. DONOVAN:** Agreed. That's why -- but if it's all  
20 out, then we know -- I think some of that -- maybe not this  
21 afternoon, but by tomorrow, maybe not directly, but indirectly,  
22 we are going to start wading into those issues.

23 **THE COURT:** All right. Well, I am interested in  
24 getting as much of the truth out in this case. If there are  
25 facts from the election results, then I think those ought to be

1 known. If there is a claim of surprise because it came too  
2 late, then I will consider that.

3 On the other hand, if there is a late analysis  
4 because it just couldn't have been done earlier, then I  
5 guess -- I want to lay it all out and get all the facts out.

6 So see what you all can do, and if you still have a  
7 dispute, I will make the decision, and I don't have any  
8 hesitation in doing that; but the point here, as much as  
9 possible, is to get it out there for the public to see and the  
10 residents of North Carolina to see so we can know what the  
11 truth is.

12 **MR. DONOVAN:** Thank you.

13 **THE COURT:** All right. 2:00.

14 **MS. RIGGS:** Your Honor, the exhibit I handed up, the  
15 League of Women Voters formally moves that into evidence.

16 **THE COURT:** So now I need to look at it?

17 **MS. RIGGS:** Otherwise, it would get lost. It's  
18 Plaintiffs' Exhibit 678.

19 **THE COURT:** It is a stipulation among the parties?

20 **MR. FARR:** No objections, Your Honor.

21 **THE COURT:** Admitted. With that, enjoy your lunch.  
22 We'll see you all at 2:00.

23 (The Court recessed at 12:32 p.m. )

24 (The Court was called back to order at 2:01 p.m.)

25 **THE COURT:** Mr. Russ?

1           **MR. RUSS:** Your Honor, I had one administrative  
2 matter before we turn to the next witness, Dr. Lynne  
3 Vernon-Feagans.

4           Yesterday, we played video deposition testimony of  
5 Ms. Yvonne Washington and Mr. Carnell Brown. I understand that  
6 when the video is playing, there isn't a transcription made of  
7 the video. So we have complete transcripts of everything that  
8 was played in the video yesterday, both our portion and  
9 Defendants' portions; and with your consent, we would move  
10 these exhibits into evidence. Ms. Yvonne Washington's video  
11 transcript would be Plaintiffs' Exhibit 679, and the  
12 transcript for Mr. Carnell Brown would be Plaintiffs' Exhibit  
13 680. If I could approach?

14           **THE COURT:** Let me ask a procedural question. Now,  
15 you've designated a larger portion of their testimony?

16           **MR. RUSS:** Yes.

17           **THE COURT:** And so what you are doing now is going to  
18 have an exhibit with what's played in court, but then you will  
19 have the separate designation filed, which will have some  
20 duplication and overlap?

21           **MR. RUSS:** I can clarify on that, Your Honor, in  
22 light of your instructions yesterday. Speaking just for the  
23 United States, for our affected voters, the video transcript is  
24 all you need to read. The other designations you will not need  
25 from the United States' perspective.



1 Ms. Vernon-Feagans is an expert who's testifying by  
2 video by agreement with the Defendants. In that case, when  
3 we -- we will rely on the video portions that we are playing  
4 for you. There are some things in the written designations,  
5 foundation for certain documents, that we are not going to play  
6 in the video; but in terms of what the United States is going  
7 to rely on in findings of fact, we are only going to cite to  
8 the video portions that we played for you.

9 **THE COURT:** Okay. Anybody have any objection to  
10 that?

11 **MR. FARR:** Your Honor, we have no objections. We  
12 haven't seen the transcripts from the videos yesterday, but I  
13 am sure that Mr. Russ has included everything. We have no  
14 objection whatsoever to that coming in.

15 I don't think from our standpoint -- as to these two  
16 witnesses, we ask that everything we designated with our  
17 written document be played. So I think our filed designations  
18 should be the same as whatever this transcript is. I'll let  
19 Mr. Strach make any comments about the -- that's all we have  
20 for right now, Your Honor.

21 **THE COURT:** Okay. I will admit both of these then,  
22 679 and 680. So they are admitted.

23 My concern remains my being able to know what it is  
24 you claim I should be reading in the record, and so I really  
25 don't want anything that's referred to now but read it later,

1 Judge. Document 360 to, you know, Exhibit F, we want to move  
2 it that in, but read it later, and then I don't keep a good  
3 record of what's in and what's not in.

4 So I just need to make sure we keep a good record of  
5 everything without duplication, for my benefit and for any  
6 other Court that takes a look at this later.

7 **MR. RUSS:** Yes, Your Honor.

8 **MS. O'CONNOR:** Bridget O'Connor on behalf of the  
9 NAACP Plaintiffs. On that last point, if Your Honor would find  
10 it helpful, we wanted to offer that after we've been through  
11 the videos, we could provide you with the same highlighted  
12 deposition excerpts that we had already put on file but  
13 indicate in the margin perhaps the portions that have been  
14 played in video, so that way you could -- if you were going  
15 back to them, you could potentially skip over the video  
16 portions which you've heard to the extent that they are broader  
17 than the portions that are played in court.

18 **THE COURT:** That would be helpful, if you can do  
19 that. Anything that's going to make it easier, because if  
20 something is admitted and the deposition is relied upon but it  
21 is not played in court, I will read it, and I'd rather not read  
22 it twice.

23 **MS. O'CONNOR:** We will plan for that.

24 **MS. GARRETT:** Good afternoon, Your Honor. The United  
25 States will play now the video deposition of Dr. Lynne

1 Vernon-Feagans in sequence. Dr. Vernon-Feagans is an expert in  
2 the data and experiences of poor African-Americans in nonurban  
3 North Carolina.

4 With your permission, I would like to deliver the  
5 script that was just discussed for the videos played yesterday  
6 for the Vernon-Feagans video, and that would be Plaintiffs'  
7 Exhibit -- it's previously marked Plaintiffs' Exhibit 681, as  
8 well as the exhibits for the Vernon-Feagans designation.

9 **THE COURT:** All right. Thank you.

10 **MS. GARRETT:** Your Honor, I just wanted to clarify  
11 something as we go through the deposition so you can  
12 cross-reference what you have in your binder in front of you.  
13 Deposition Exhibit 1 will be referenced in the video, and it is  
14 Plaintiffs' Exhibit 240. Deposition Exhibit 2, as referenced  
15 in the video, is Plaintiffs' Exhibit 252. Deposition Exhibit 3  
16 is Plaintiffs' Exhibit 509 at pages 28 and 29 of Plaintiffs'  
17 Exhibit 240. Deposition Exhibit 4 is Plaintiffs' Exhibit 510  
18 at pages 30 and 31 of Plaintiffs' Exhibit 240. And Deposition  
19 Exhibit 5 is Plaintiffs' Exhibit 511, also within Plaintiffs'  
20 Exhibit 240. Deposition Exhibit 6 is Plaintiffs' Exhibit 512.  
21 And Deposition Exhibit 7 is Plaintiffs' Exhibit 513.

22 So throughout the video, she'll be referencing her  
23 deposition exhibits, but those deposition exhibits are  
24 cross-referenced with Plaintiffs' exhibits.

25 For the script in front of you, the portion of the

1 United States' direct that is counter-designated by Defendants  
2 is page 13, and it is page 31, line 20, to page 32, line 25, of  
3 the deposition. We highlighted it in yellow for your  
4 reference.

5 And, finally, the full deposition designations and  
6 counter-designations for Dr. Vernon-Feagans have been provided  
7 to the Court in matter Number 861 at ECF Number 293, 307, and  
8 308.

9 **THE COURT:** Okay. So you are playing a portion of  
10 the deposition today; is that right?

11 **MS. GARRETT:** We are playing a portion of the  
12 designated deposition.

13 **THE COURT:** But the rest of the designations, are  
14 they being moved into evidence as well?

15 **MS. GARRETT:** After we play, we are going to ask for  
16 the full designated portions of the deposition to be moved in.  
17 And, Your Honor, just so I can tell you right now, it is a very  
18 small additional portion.

19 **THE COURT:** All right.

20 **MS. GARRETT:** Okay. So we can play the video. Thank  
21 you.

22 (Designated portions from the video deposition of  
23 Dr. Lynne Vernon-Feagans was played.)

24 **MS. GARRETT:** Your Honor, we think we might be having  
25 a problem with the tape right now. If we could pause this

1 particular witness at this time and continue with another  
2 witness and pick up right there at 37, line 1.

3 **THE COURT:** Is this on a disk or a tape? What's the  
4 format?

5 **MS. GARRETT:** It is on a -- it is a series of clips  
6 in the computer program. If you would prefer to have it on a  
7 disk --

8 **THE COURT:** It doesn't matter to me. I am just  
9 curious as to the process. All right. Why don't you go ahead  
10 and see if you can get that fixed, and we'll return to it.

11 **MS. GARRETT:** Thank you, Your Honor.

12 **THE COURT:** You may call your next witness.

13 **MS. MEZA:** Good afternoon, Your Honor. The United  
14 States calls Dr. Charles T. Clotfelter to the stand.

15 **CHARLES T. CLOTFELTER, PH.D., PLAINTIFFS' WITNESS,** at 2:36  
16 p.m., being first duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 **BY MS. MEZA**

19 Q Good afternoon, Dr. Clotfelter. Can you please introduce  
20 yourself to the Court.

21 A I am Charles T. Clotfelter. I'm a professor of public  
22 policy, economics and law at Duke University.

23 Q And how long have you held that position?

24 A I have been at Duke since 1979. Before that, I taught at  
25 the University of Maryland.

1 Q And, Dr. Clotfelter, could you tell us about your  
2 educational background? What degrees do you hold?

3 A I have an undergraduate bachelor of arts from Duke  
4 University. I majored in history, graduated in 1969. I have a  
5 master's and a Ph.D. in economics from Harvard University, and  
6 I received a Ph.D. in 1974.

7 Q And as a professor of public policy and economics, what is  
8 the focus of your work or your area of expertise?

9 A Most of my research has been in the economics of education  
10 and in something we call public economics.

11 Q And what parts of your previous academic research are most  
12 relevant to the work you did in this case?

13 A Probably the work I have done on school desegregation and  
14 on education in North Carolina. In my dissertation, I looked  
15 at some of the effects of school desegregation, and then I  
16 published some articles. And then in 2004, I published a book  
17 called *After Brown: The Rise and Retreat of School*  
18 *Desegregation*. I was published by Princeton University Press.  
19 And in addition, I, with two coauthors, Helen Ladd and Jacob  
20 Vigdor, have done a number of studies looking at data from the  
21 state of North Carolina.

22 Q And approximately how many articles have you published in  
23 scholarly reviewed journals?

24 A A little over 60.

25 Q And are you a member of any professional organizations in

1 your field?

2 A I am a member of the American Economic Association, the  
3 Southern Economic Association, and the Association for Public  
4 Policy and Management.

5 Q Have you received any awards or special recognition in  
6 your field?

7 A I was president of the Southern Economic Association. I  
8 received, along with one other winner, the Gladys Kammerer  
9 award for the best study in political science on national  
10 policy in 2004 for that book on school desegregation.

11 Q What was that book again?

12 A What was the --

13 Q The book.

14 A The book was *After Brown: The Rise and Retreat of School*  
15 *Desegregation*.

16 **MS. MEZA:** Your Honor, based on these qualifications,  
17 and as more fully set out in Dr. Clotfelter's expert  
18 declaration in this matter, the United States offers Dr.  
19 Charles Clotfelter as an expert in the economics and history of  
20 education in North Carolina.

21 **THE COURT:** Any objection?

22 **MR. STRACH:** No objection, Your Honor.

23 **THE COURT:** He can give his opinions.

24 **BY MS. MEZA**

25 Q Dr. Clotfelter, what were you asked to do for this case?

1 A I was asked to look at disparities in educational  
2 resources in North Carolina between black and white students,  
3 to look at both past and present, to look at gaps in  
4 achievement and educational attainment between blacks and  
5 whites, both past and present, and to see whether there was any  
6 link between those.

7 Q And were you asked to perform any analysis of voting or  
8 voting behavior?

9 A No, I was not.

10 Q And were you asked to perform any analysis of House  
11 Bill 589?

12 A No, I wasn't.

13 **MS. MEZA:** Your Honor, may I approach?

14 **THE COURT:** Yes.

15 **MS. MEZA:** I just handed Dr. Clotfelter a copy of  
16 Plaintiffs' Exhibit 237 and 249. They are Dr. Clotfelter's  
17 expert declaration and surrebuttal declaration in this matter.

18 **BY MS. MEZA**

19 Q Dr. Clotfelter, are the exhibits I just handed you your  
20 expert report and surrebuttal report that you prepared for this  
21 case?

22 A Yes, they are.

23 Q Do these reports describe the analysis you undertook in  
24 this case and your conclusions?

25 A They do.



1           **MS. MEZA:** The United States moves to admit into  
2 evidence Plaintiffs' Exhibit 237 and 249.

3           **MR. STRACH:** No objection, Your Honor.

4           **THE COURT:** Admitted.

5 **BY MS. MEZA**

6 Q       Could you briefly summarize your overall conclusions?

7 A       In a capsule, I found that the past disparities and  
8 current disparities have had both direct and indirect effects  
9 on achievement and attainment among citizens of North Carolina  
10 and that there are linkages that have the effect of  
11 perpetuating some of these gaps.

12 Q       And could you describe the steps you took in preparing  
13 your report?

14 A       I reviewed what I considered the relevant published  
15 material. This was reports and books. I looked at government  
16 statistics, and I reviewed the results of published work that  
17 I've done along with coauthors.

18 Q       And what primary sources of data did you use for your work  
19 in this case?

20 A       Most of the data are U.S. Government, such as census. And  
21 we actually utilized a data set in our research based on  
22 individual records from North Carolina students. The State of  
23 North Carolina in the 1990s made an agreement with Duke  
24 University and the University of North Carolina to allow access  
25 to individual student records, as long as the identities were

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 removed. All of us that worked on it signed confidentiality  
2 agreements, and this allows the analysis of detailed records  
3 with large numbers of data points.

4 Q And was that the North Carolina Education Research data?

5 A That's right. The name of the center is the North  
6 Carolina Education Research Data Center.

7 Q And are the methods you used widely accepted in the fields  
8 of public policy and educational research?

9 A Yes, they are very conventional.

10 Q Dr. Clotfelter, did you examine the intergenerational  
11 links between parental education and children's educational  
12 outcomes?

13 A I did for this report. I found that it appeared in a  
14 number of studies that we have done and others, even studies  
15 that we really were focusing on something else, like  
16 achievement. So the answer is, yes, we studied it and others  
17 have studied it.

18 Q Can you explain the distinction between educational  
19 achievement and educational attainment?

20 A As used by researchers, achievement refers to usually the  
21 results of standardized scores. They could study what  
22 somebody -- the knowledge that somebody has or the aptitude or  
23 skills they have. That's achievement. And attainment usually  
24 refers to the number of years of schooling or degrees obtained.

25 Q So just going back to the topic I asked you about, did you

1 come to any conclusions about intergenerational links between  
2 parental education and children's educational outcomes?

3 A What I concluded from looking at this is that there were  
4 both direct and indirect effects on these gaps as a result of  
5 the differences in resources provided for blacks and whites,  
6 and that led to differences in schooling, achievement, and  
7 ultimately in socioeconomic status.

8 Q Okay. Why don't we look at an example. Can you turn to  
9 page 7 of your report. It actually will come up on your  
10 screen. We are going to look at paragraph 13.

11 A Okay.

12 Q Can you briefly summarize what you are reporting in this  
13 paragraph?

14 A I think the main message in this is that we find that the  
15 children of more highly educated parents do better, as measured  
16 here by the achievement, the scores and the end-of-grade tests  
17 for fifth graders in the state.

18 And this is a finding -- a lot of researchers have  
19 found -- in this case, we found that the children of parents  
20 who had finished high school did better than the children of  
21 parents who didn't, and we found that those who finished some  
22 college did better than the high school graduate kids, and that  
23 the children of college grads did better than them.

24 And so the real message -- and this is, again, a finding  
25 that a number of researchers have discovered -- is that there

1 is a systematic relationship between the educational attainment  
2 of the parents and the achievement of the children.

3 Would you like me to talk about the numbers?

4 Q Sure. So you explain your conclusions using standard  
5 deviation. Could you explain what standard deviation is?

6 A So in that paragraph, the findings are -- the way we  
7 talked about it in the article was the standard deviation  
8 differences from the lowest group, that is, the group with the  
9 parents that had the least education. So every one of those  
10 categories is using that difference.

11 What I think would be the helpful takeaway is that -- is  
12 to look at the difference between those second two numbers,  
13 between the .539 and the .345. These are results for -- the  
14 highest one is the children of college graduates. And the .345  
15 is the result for the children of high school graduates. The  
16 difference between those two is approximately three-tenths of a  
17 standard deviation.

18 Why do social scientists like us use standard deviation?  
19 So let me just take a detour and answer that question because  
20 it does seem strange.

21 The reason that social scientists use standard deviations  
22 is because often they are comparing outcomes that have  
23 different scales. Imagine -- ask the question whether a  
24 one-point increase in a scale is important. If the scale were  
25 a grade point average, the difference between a 2.0 and 3.0 is

1 an enormous difference. But in the SAT, where the scores go  
2 from 200 to 800, a one-point increase is insignificant.

3 So what researchers do is to use something called the  
4 standard deviation, which is really a measure of the spread.  
5 So in the case of the GPA, the grade point average, it is very  
6 tight. In the case of the SAT, it is broad.

7 What does .3 of a standard deviation mean? It means the  
8 following: Children of high school graduates -- and we compare  
9 them to children of college graduates -- only about 38 percent  
10 of children of high school graduates will be higher than the  
11 average for children of college graduates; whereas, 50 percent,  
12 by definition, of the children of college graduates would be.

13 Another way to think about .3 -- the question you would  
14 want to ask is, is this a big deal. .3 of a standard deviation  
15 is approximately the average achievement that a fifth grader  
16 makes in a whole year. So the difference between these two  
17 groups is something on the order of what a child might learn in  
18 a whole year.

19 Q Dr. Clotfelter, have those conclusions, the conclusions  
20 reached in your study regarding intergenerational effects, have  
21 they been replicated?

22 A It turns out they have been. Before we ever did it, there  
23 were studies that looked at this. A review of the literature  
24 that I quoted in the report cites the large number of studies  
25 that show that there is this connection, statistical connection

1 between a child's achievement and their parents' educational  
2 attainment.

3       There is also a good deal of evidence that links the  
4 socioeconomic status of the parents, of which education is a  
5 big component, and the attainment of children. For example, if  
6 you did a table of the percentage of young people that go to  
7 college, that would be related to the socioeconomic status.

8 Q     Dr. Clotfelter, did you also examine the history of  
9 educational discrimination in North Carolina for this case?

10 A     I did.

11 Q     And did you reach any conclusions as a result of your  
12 examination?

13 A     The State of North Carolina provided -- systematically  
14 provided less in terms of school resources to black children  
15 than white children throughout most of its history, not all,  
16 and that would be the main conclusion having to do with the  
17 disparity in resources in the past in North Carolina.

18 Q     Can you discuss some of these disparities more  
19 specifically? What specific resources were --

20 A     It could be -- the disparities in resources could be  
21 measured in a number of ways. After 1900, for at least the  
22 first five decades of the 20th Century, there were expenditure  
23 differences that were systematically in favor of white  
24 children. The per-child expenditures in white schools was just  
25 much higher than for black schools. North Carolina was not

1 only the state where that's the case.

2 For example, in 1915, in the state of North Carolina, when  
3 black children constituted 33 percent of all students, only  
4 13 percent of expenditures in the state were devoted to schools  
5 for black children.

6 Q Let me turn to Table G in your report.

7 A Okay.

8 Q Well, before we do that, did these disparities in  
9 expenditures, facilities and such, did they correlate with the  
10 educational attainment of students who were subject to these  
11 racially disparate resources?

12 A They did. One thing I could have mentioned about  
13 expenditures, that was not only the way you could tell there  
14 was differences. You could look at the facilities for black  
15 schools versus white schools. You could look at the property  
16 values per child. There were differences. There were even  
17 differences in the curricula offered in black schools and white  
18 schools.

19 You asked me to look at past gaps in achievement and  
20 attainment. And, yes, there were clear correlations. In terms  
21 of achievement, in 1930, the U.S. Census found in North  
22 Carolina 21 percent of the black population was illiterate  
23 compared to 6 percent of the white population in 1930.

24 Q Why don't we turn back to Table G. Can you tell us what  
25 is reflected on this table about past racial gaps in

1 attainment?

2 A Well, these are data from the U.S. Census. The question  
3 the Census asked in every household: Did you finish high  
4 school? Did you finish college?

5 And in the state of North Carolina, if you look at the  
6 first line, for example, in 1940, the difference of -- between  
7 the two racial groups in high school completion was fairly  
8 large. It was 23 and a half percent versus 6 percent for  
9 blacks. For college graduates, 5 percent of the white adult  
10 population had finished college; whereas, only 1.6 percent of  
11 blacks had.

12 **THE COURT:** Does high school graduate include GED or  
13 not?

14 **THE WITNESS:** I think, Your Honor, that in 1940, GED  
15 may have been so insignificant. I will bet you anything that  
16 it does in the later years.

17 **THE COURT:** In your chart Table G?

18 **THE WITNESS:** Yes. I am just -- I am trying to guess  
19 what the census would include, and I think that they would.

20 **THE COURT:** I don't want you to guess. But if you --

21 **THE WITNESS:** I couldn't tell you for sure.

22 **BY MS. MEZA**

23 Q Dr. Clotfelter, did you also examine current racial gaps  
24 in attainment?

25 A Yes. In fact, in this same table, you can go to year 2010



1 and, as you can see, the percentage gap in high school  
2 completion is quite a bit smaller, but there are still gaps.  
3 Consider, for example, the gap in the percentage of the adult  
4 population that has a college degree. It's almost 30 percent  
5 for white 25-year-olds or older versus 17 percent for black.

6 Q Let's turn to achievement. Could you please refer to  
7 Table H from your report. Could you tell us what is reflected  
8 on this table, Dr. Clotfelter?

9 A These are results of a national achievement test that's  
10 given by the U.S. Government called the national assessment of  
11 economic progress -- I'm sorry of educational progress. It is  
12 given in different grade levels, and there is a reading and a  
13 math test. This is the fourth grade test in math, and it is  
14 describing results in the state of North Carolina.

15 The makers of the test create several thresholds called  
16 basic, proficient, and advanced. Higher grades -- higher  
17 scores might have a chance of being advanced; whereas, lower  
18 scores might only have the chance of passing a basic or  
19 proficient.

20 If you look at the proficient rate, there is a gap, and  
21 there are gaps in each of these. In the proficient level, it  
22 says that 60 percent of white fourth graders in North Carolina  
23 are passing this test at the proficient level compared to only  
24 22 percent of African-American children in the fourth grade.

25 Q And this is under the mathematics proficiency?

1 A That's right, in math.

2 Q What about in reading? What does it reflect about the  
3 proficiency in reading?

4 A The qualitative findings are similar. The gap is a little  
5 bit smaller at the proficient level and just about the same at  
6 the advanced level.

7 Q And are these gaps exclusive to fourth graders?

8 A No. They are observed at other levels. One of the  
9 studies that we did with North Carolina Education Research Data  
10 Center data, we looked at the end-of-grade tests that are  
11 administered in this state in reading and math for every grade  
12 from third grade until eighth grade. We measured these gaps,  
13 and they are substantial over this grade span, and they don't  
14 get any smaller from the third grade to the eighth grade.

15 Q Do the racial disparities in the distribution of resources  
16 to public schools still exist today?

17 A They do. They are not as extreme as they were.

18 Q Can you provide some examples?

19 A In our work, let me give a couple. One of the things we  
20 did was to utilize our administrative data to actually pair  
21 each student with -- per teacher, and this is for seventh  
22 grade. So we took the seventh grade end-of-grade math test and  
23 from that information we were able to identify the teacher and  
24 the student.

25 And we asked the question: What percentage of students

1 have a brand-new teacher, that is, a teacher with no previous  
2 experience? And we found that there is a racial gap that black  
3 children in the seventh grade in North Carolina have about a  
4 12 percent chance of a having a brand-new teacher and white  
5 students have about an 8 percent chance.

6 We also broke up schools by their racial composition. We  
7 split all the schools in the state at each level into quartiles  
8 by the percentage of minority students; and if I were to  
9 compare the schools with the highest percentage minority with  
10 the lowest percentage, there are systematic differences in the  
11 kinds of teachers that they get.

12 The schools with high minority pupils have a higher  
13 percentage of inexperienced teachers. They have teachers that  
14 scored lower on the test, the state test scores. They have a  
15 smaller percentage of teachers who are nationally board  
16 certified, and they have a smaller percentage of teachers who  
17 went to a school that's ranked by Barron's as a competitive  
18 school.

19 So, systematically, the schools with a high percentage  
20 minority have teachers with less impressive or weaker  
21 credentials.

22 Q And when you refer to racial imbalance in schools in your  
23 report, you are speaking about this low minority/high minority  
24 distinction?

25 A Yes. We actually have done studies specifically to look

1 at how racially balanced the schools are in each county or each  
2 school district. And the way we defined this was we used an  
3 index that ranges from zero to one that shows how balanced the  
4 schools are. If every school had the same racial composition,  
5 the index would be zero per zero, or segregation is another  
6 term used. If the schools were completely segregated by race,  
7 there would be an index of one. And so we looked at this index  
8 over time.

9 Q What is the relationship between racial imbalance in  
10 school and the distribution of resources?

11 A Well, it's important in the following sense: Without  
12 racial imbalance, it's almost impossible to have the kind of  
13 disparities in terms of the teacher qualifications and their  
14 relationship to race. Having schools that are racially  
15 imbalanced doesn't guarantee that there will be disparities,  
16 but it allows that to happen.

17 Q And has the State of North Carolina ever tried to  
18 compensate for this imbalance in resources between high  
19 minority and low minority schools?

20 A Well, the State of North Carolina Department of Public  
21 Instruction, like researchers in general, realize that these  
22 disparities in teacher quality come about to a large extent  
23 because there is a teacher labor market and teachers are  
24 allowed to -- they are not required to stay at the school  
25 forever. They tend to want to teach in schools that have more

1 affluent populations and other characteristics.

2 In order to -- and so the State realizes that some of the  
3 poorest schools in the state are served by a preponderance of  
4 inexperienced teachers. So in the year 2000, they instituted a  
5 program that would pay \$1,800 a year to any teacher in a  
6 certain set of schools that had low income or low achievement  
7 if these teachers were in one of three fields. They were math,  
8 science, or special Ed. And so for three years, this bonus  
9 program was in place.

10 We did a study to see whether that bonus program was  
11 effective in keeping teachers identified to be highly important  
12 in the schools; and we did find that as a result of the bonus  
13 program, the attrition rate for these teachers was decreased.

14 Q So it was fairly successful?

15 A So by some measures, it was -- it certainly had a  
16 statistical effect, and I think some people would say it was  
17 successful, yes.

18 Q Is the program still in place?

19 A No, it was closed down after three years.

20 **MS. MEZA:** Thank you, Dr. Clotfelter. I have no  
21 further questions.

22 **THE COURT:** Any cross?

23 **MR. STRACH:** Yes, Your Honor. Thank you.

24 CROSS-EXAMINATION

25

1 **BY MR. STRACH**

2 Q Good afternoon, Dr. Clotfelter. Good to see you again.

3 A Good to see you again.

4 Q My name is Phil Strach. As you recall, we took your  
5 deposition in April, I believe, of this year?

6 A Yes, sir.

7 Q And I represent the Defendants, and I have a few questions  
8 to ask you about your testimony and your report.

9 I wanted to make sure it's clear. You referenced this at  
10 the very beginning of your testimony, Dr. Clotfelter. You were  
11 not asked by the Government to study the extent to which lower  
12 education attainment by blacks affects their ability to  
13 register and vote, were you?

14 A Right. As I testified, I was not asked to do that. I was  
15 asked to look at disparities in resources and gaps in  
16 achievement.

17 Q All right. And as we discussed in your deposition, when I  
18 use the term "Senate Factors," you don't -- do you know what I  
19 am talking about?

20 A I have heard them.

21 Q All right.

22 A I have heard of them. I don't know what they are.

23 Q And you certainly weren't giving an opinion in this report  
24 on anything related to the Senate Factors; correct?

25 A Unless I did it unknowingly, because I -- I was not asked

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 to do that.

2 Q All right. And you have not given any opinion in this  
3 report on the ability of African-Americans to comply with the  
4 existing 25-day rule for registering to vote; correct?

5 A That is correct.

6 Q And you have not given any opinion on the ability of  
7 African-Americans to comply with voting in their correct  
8 precinct; is that correct?

9 A Right.

10 Q Now, regarding the data that you used itself for the  
11 conclusions that you gave in this case, I wanted to confirm  
12 with you, your data consists of data from the public school  
13 system; correct?

14 A That is true. These data are supplied by the Department  
15 of Public Instruction, and so they have jurisdiction only on  
16 the public schools of North Carolina.

17 Q All right. So the data does not contain data from private  
18 school students?

19 A Correct.

20 Q Or homeschooled students?

21 A Correct.

22 Q And do you have any idea of what percentage of blacks  
23 students are in private schools or homeschools?

24 A I think you might have asked that before, and I didn't  
25 know it and I still don't. I think I might have said that in

1 the U.S., about 10 percent of students at the K-12 level go to  
2 private schools, but I really don't know what it is.

3 Q Okay. And, of course, your report also does not account  
4 for any learning or education that students of whatever race  
5 may do or be provided on their own outside of the school  
6 system?

7 A Well, probably it does. So these students are taking  
8 achievement tests at the end of the year. So usually taking  
9 them in May, and they are presented with questions and if they  
10 were read to home, if they did extra studies at home, if they  
11 did their homework, all those things would be reflected in how  
12 well they did. Is that what you were getting at?

13 Q Yes, thank you. So the other concept I wanted to discuss  
14 with you, just to be clear, is you have concluded that there is  
15 a correlation between disparities in school resources and  
16 racial gaps in educational attainment; is that correct?

17 A Yes.

18 Q Okay. You have not concluded nor can you conclude that  
19 there is any causal relationship; is that right?

20 A This might bear a couple of minutes on my answer because  
21 in social science, as actually in natural science, causation  
22 depends -- really demands both correlation and then a theory  
23 about why the correlation happens. If I stuck my finger into  
24 boiling water and it was burned, there would be a correlation  
25 between that act and it having a burn on it, but whether it was



1 caused really is a function of what is our theory about the  
2 molecules and their effect.

3       If other research is confirmatory that this is a cause,  
4 then you'd have a stronger argument, but it's always an  
5 argument. So in the case of, let's say, the education of the  
6 parents and the achievement of children, what I was reporting  
7 is a correlation, and that's the only thing that is as firm as  
8 this table. But there is other research that -- used by  
9 people, like ethnographic researches, who go into homes and  
10 observe the difference between homes where the parents have  
11 more education. They observe the number of words that the  
12 children have.

13       And so I would say that the statistics -- the only thing  
14 that you can say for sure is that it's a correlation, but the  
15 researchers in the body of social science research would tend  
16 to say it looks like it's causation because we can't think of  
17 other reasons why this might have happened.

18       If what -- I think the most common thing in economics  
19 these days is to say there is a correlation, but there is  
20 probably some kind of error. There is something else going on  
21 that explains that. And in the case of the educated parents  
22 and the high-achieving children, it is really hard to think of  
23 what other things might be happening.

24       So, again, I think the answer would be we can say for sure  
25 it's correlation because it's on the computer printout.

1 Whether it's causation is in the eye of the researcher; but I  
2 think in this case, it's a pretty good argument that it's  
3 causal.

4 Q All right. And you discussed a period of time, in fact, I  
5 believe in the 1800s, when per capita education spending was  
6 equitable and black voter participation was actually higher  
7 than whites. Did I get that right?

8 A This was in the period, in fact, that was described in  
9 earlier testimony today, in the late 19th Century. The  
10 statistics that I present show that the ratio of black to white  
11 sometimes went over one, sometimes went under one. So it did  
12 vary.

13 It was when it got to 1900 when there was really a  
14 consistent pattern of per capita spending in white schools of  
15 being higher.

16 Q Okay. But there was a -- certainly a correlation between  
17 per capita education spending and black voting participation in  
18 that time period; correct?

19 A There seemed to be. I don't know how long it was, but  
20 there did seem to be in some of those years. I would have to  
21 go back and look at precisely the years that you are referring  
22 to, but I do remember that before -- this is based on the  
23 Hartzband study of expenditures in North Carolina, I think.  
24 And that before 1900 -- there were years going on both sides,  
25 but beginning in 1900, it was all one way.

1 Q All right. And I think you would agree with me that in  
2 the last 20 years in North Carolina, there haven't been any  
3 actual spending disparities in terms of actual of expenditures  
4 because schools have been integrated; correct?

5 A Well, it's basically we don't know because the people that  
6 ran the schools segregated them by race until 1954 and actually  
7 kept statistics a little longer than that and that made it easy  
8 to look at spending disparities, but now that's not the way  
9 schools are set up.

10 So there may be some disparities, but we would never be  
11 able to discover it. So what you're left with is to look at  
12 other measures like, you know, what kind of teacher people  
13 have.

14 Q Right. But because the schools are integrated, you cannot  
15 say that there's any actual spending expenditure disparities --

16 A Yeah, there's no way; I agree.

17 Q In fact, there are no -- unlike in the past, there are no  
18 longer identifiable black schools and white schools as you  
19 said; correct? Is that right?

20 A Thankfully, yes.

21 Q All right. So there has been a great deal of progress in  
22 terms of integrating at least the public schools?

23 A There have been, yes.

24 Q And there's been a lot of progress in the level of  
25 expenditures themselves for the public schools; correct?

1 A I don't look at that, but I think that's the case. Even  
2 when you hold inflation constant, I think it's gone up.

3 Q In fact, in your report, as I recall, Dr. Clotfelter,  
4 there was a chart that indicated that even earlier than 1959,  
5 the salary of black teachers began to overtake that of white  
6 teachers?

7 A Right. There was a table that looked at the average  
8 salary for black teachers and white teachers. And at some  
9 point was it -- you have it in front of you. Probably around  
10 1950 --

11 Q Right.

12 A -- or something, the number for blacks went above the  
13 number for whites. Probably the way to think about that is  
14 that in the black community, in the black labor market, the  
15 number of occupations open to black individuals was really  
16 limited. It turned out to be the ministry, the law, medicine,  
17 and education, and, whereas, opportunities for whites was much  
18 more extensive.

19 So it was conceivable that once the State began to pay  
20 comparable salaries based on qualifications and degrees, if  
21 black teachers had more master's degrees, that would explain  
22 it, or stayed in their jobs longer because the salaries are  
23 usually based on experience and degrees.

24 Q Okay. And the numbers in your report bear that out given  
25 the increases; correct?

1 A They would certainly be consistent with that story, yeah.

2 Q Right. Okay. And then sort of the other side of this, I  
3 wanted to ask you about a question about the gap in college  
4 graduates that you just testified about a moment ago.

5 Isn't it true that -- and I believe that was Table G.

6 A G, uh-huh.

7 Q It appeared to me in looking at Table G that the gap  
8 between blacks and whites graduating from college has actually  
9 gotten wider recently; correct?

10 A Yeah, so it is always a question about how you measure  
11 these gaps. There's two ways to do it. One would be to  
12 subtract one from the other, and the gap would have gotten  
13 bigger that way, but the other way is look at the proportional  
14 difference. And so you take the ratio of the white to the  
15 black and -- and in that way, it's gotten smaller  
16 proportionately. So it is kind of how you want to look at it.

17 But, certainly, the rate of college completion has  
18 increased for both blacks and whites.

19 Q Right. And so to the extent that you can measure it in a  
20 way that shows that it's -- that the gap has widened, that  
21 certainly can't be explained by any official discrimination by  
22 the State; correct?

23 A Well, again, it's -- whether it's widened or narrowed,  
24 it's still there, and that comes up from subtracting but not  
25 from dividing. But the question has to do is that the result

1 of official discrimination?

2 Q Right.

3 A I think the role of official discrimination is probably  
4 negligible.

5 Q And, in fact, isn't it true, as we discussed in your  
6 deposition, that with respect to this disparity anyway,  
7 something other than State action is contributing to the  
8 disparity?

9 A I think in a lot of things. Certainly, the State is not  
10 the only actor.

11 Q All right. And isn't it also true that your report showed  
12 that the Hispanic high school diploma rate is less than the  
13 black high school diploma rate?

14 A It could. Could you point me in the direction of that?  
15 Or is it in 41?

16 Q Sure, let me find it.

17 A Okay.

18 Q Paragraph 40, I believe.

19 A Okay.

20 Q So the percentage for black adults was 79.9 percent, and  
21 for Hispanics it was 53.9 percent. Let me make sure I have  
22 that.

23 A I am just trying to figure out what this is a rate of.

24 Okay. There is the percentage of adults 25 and older who  
25 have a high school diploma or the equivalent. And so for

1 whites, it was 88.1 percent, for blacks it was 79.9 percent,  
2 and for Hispanics it was 53.9 percent, I think, in 2010.

3 Q So the high school diploma rate for Hispanics was quite  
4 significantly lower even than for blacks.

5 A Yes, it was.

6 Q Is that fair to say?

7 A Yes, it was.

8 Q And are you aware of any history of official  
9 discrimination against Hispanics comparable to the history of  
10 official discrimination against African-Americans?

11 A I don't think anything comes up to the level of official  
12 discrimination against blacks, but there was and has been a  
13 significant discrimination against Hispanics. There are, of  
14 course, a ton of different circumstantial reasons why those  
15 might be different.

16 But in answer to your question, nothing comes up to the  
17 level of discrimination against black people.

18 Q Right. And so there may be a ton of other reasons to  
19 explain that outside of official discrimination; correct?

20 A Yes, indeed.

21 Q In paragraph 41 of the report, you report the scores of  
22 students on the NAEP, I believe, and the scores of Asian  
23 students were higher than white students on the NAEP; is that  
24 correct?

25 A For the proficient level in math, they were. They were 67

1 for Asian and 60 for white. Advanced, it was 30 for Asian and  
2 12 percent for white, yes.

3 Q All right. And there certainly hasn't been any history of  
4 preferences for Asians over whites in North Carolina. Would  
5 you agree with that?

6 A No history of preferences.

7 Q In fact, there may be a history of official discrimination  
8 against Asians; correct?

9 A Well, in the United States there has been. I am really  
10 not sure if we would say the same about North Carolina. I just  
11 don't know, but certainly in the United States there has been.

12 Q All right. So the history of discrimination then cannot  
13 fully explain the differences in these test scores; is that  
14 correct?

15 A That is abundantly correct.

16 Q And, now, in the scores that you reported, Dr. Clotfelter,  
17 in Table H, which I believe we were just talking about -- this  
18 is the performance on the NAEP for fourth graders in 2013 --  
19 isn't it true that what you were doing here through this table  
20 is simply documenting the differences in the scores rather than  
21 trying to provide an explanation for why the differences exist?

22 A Correct.

23 Q And I think we also talked about the issue of what  
24 causes -- what might cause these differences in terms of race  
25 versus poverty, and I think you would agree with me, wouldn't



1 you, that you have not attempted to tackle the answer to the  
2 question of whether it's race or poverty that better explains  
3 the differences in these test scores?

4 A No, not in my report.

5 Q All right. To do that, you would have to do a fairly  
6 sophisticated significant quantitative analysis; correct?

7 A What you would have to do is to try to ferret out the  
8 independent effects of racial identification versus income or  
9 socioeconomic status; and because they are correlated, it's a  
10 difficult statistical challenge, but I didn't try to do it.

11 Q All right. Do you think it could be done?

12 A People have done -- you know, they've tried, but I think  
13 it's ultimately, at the end of the day, you say there is some  
14 contribution, but we have this thing called -- I'm afraid to  
15 say it -- multicollinearity, and that is when two variables go  
16 together so often, you don't know which one is responsible; and  
17 that's the thing you run into.

18 Q Okay. All right. I want to talk a little bit about some  
19 of the testimony you have given on this notion of racial  
20 imbalance in the schools.

21 A Yes.

22 Q I think you talked about it with respect to teachers,  
23 et cetera, and I just want to focus on a couple of things.

24 One of the things that we talked about in your deposition,  
25 as I recall, that I think may have been in your report was the

1 difference, say, for instance, in the Charlotte-Mecklenburg  
2 schools. They did not have a policy of assigning students  
3 based on race to schools. They let the -- they have more of a  
4 neighborhood schools approach where they let the parents have  
5 more say in terms of where the kids go to school. Is that a  
6 somewhat accurate description of how they do it in Charlotte?

7 A My rudimentary understanding of law here is that around  
8 1990, led by the Fourth Circuit and then the Supreme Court,  
9 basically said there shall be no assignment of students by  
10 race, even to the extent of saying we are going to try to keep  
11 these schools within some bound. So Charlotte does not assign  
12 by race, nor does -- nor can any district that -- unless it is  
13 under a previous Court order can do any assignment by race.  
14 That would be I think -- so it would be accurate to say they  
15 don't.

16 Q Well, let me ask you this: So there is no official  
17 policy, state policy or otherwise, requiring students to be  
18 assigned based on race in the Charlotte-Mecklenburg schools;  
19 correct?

20 A I think that would be correct.

21 Q Okay. And so to the extent that there's a racial  
22 imbalance in where the students end up, that's not a product of  
23 any action by the State; correct?

24 A Well, I mean, yes and no. So let's think about what the  
25 State has its fingerprints on here. I don't know if you are

1 counting Charlotte-Mecklenburg schools as part of the State,  
2 but certainly the Government. So one thing that the State is  
3 doing is constraining the choices of individual parents.  
4 Before, there was an assignment to a school. Under the plan  
5 that was adopted a few years ago in Charlotte-Mecklenburg,  
6 parents are given a choice of schools within a quadrant, which  
7 is kind of desegregation, a ruling that a number of places did,  
8 including Winston-Salem at some point.

9 But the State is also allowing -- secondly, allowing  
10 school districts to have supplements and so that the more  
11 affluent districts, like my home county and my neighboring  
12 county of Chapel Hill, has an additional amount. So that  
13 really encourages the more experienced teachers to seek jobs in  
14 certain school districts.

15 And so -- and I guess that to the extent that the State  
16 follows the usual norm of allowing teachers to go anywhere they  
17 want and there is a place, again, there is the opportunity for  
18 those disparities to arise. So it's minimal, but it's there.

19 Q Okay. So is it -- in the case of the  
20 Charlotte-Mecklenburg schools, for instance, in the school  
21 system failing to constrain the private choices of the parents,  
22 isn't it more accurate to say that that is State inaction, not  
23 actual State action?

24 A I guess there might be a semantic aspect to this. It is  
25 certainly not the same as writing a letter and saying you are

1 going to go to Myers Park school. So it's just setting some  
2 parameters within which you can operate.

3 If you think about -- something that you might think of as  
4 real State action, we impose an income tax. Well, the people  
5 that have the tax imposed on them have the choice about whether  
6 they are going to work or not and how much they are going to  
7 work. So there is certainly some private action involved. So  
8 I don't know if we call that State action or inaction when the  
9 Government allows me to pay the amount of tax based on how much  
10 I earn.

11 Q Okay. And similarly, with the example of the teachers, in  
12 terms of the racial imbalance that you discussed in terms of  
13 the degree to which white and black students are exposed to  
14 ineffective or weaker teachers, is the way I think you put it  
15 in your report, so the State could impose a policy, couldn't  
16 they -- they could actually impose a rule that said that every  
17 student had to rotate through every teacher's classroom?

18 A Right. That was the idea that you suggested in the  
19 deposition. Yes, and it's an inventive that would be a very  
20 expensive and disruptive and probably unpopular thing, but --  
21 policy, but that would effectuate what you're saying.

22 The other approach that would essentially have the same  
23 effect is to mandate that the schools all be racially balanced,  
24 because then it would be impossible for black children on  
25 average to have teachers with systematically different

1 qualifications than the ones with whites.

2 Q Okay. So the disparities that currently exist are really  
3 caused by the policy of allowing the teachers to choose  
4 themselves what school to go to; correct?

5 A That is largely, and that plus the differences in spending  
6 that's allowed by the local additions.

7 Q So the State action here or, as I put it, State inaction  
8 is really simply the failure to constrain the private decisions  
9 of teachers to -- in terms of where they want to teach?

10 A Well, another way of saying it is the failure to provide  
11 incentives for teachers to teach in these hard-to-staff  
12 schools. The experience of the State in the three years that  
13 they had this 1,800-dollar bonus showed, A, that the  
14 legislature was concerned about this problem and, second, that  
15 the policy could be effective. And so I think you could look  
16 upon it and say that by taking this away, it's State inaction,  
17 but it's got an asterisk to it because they knew that a certain  
18 action would be effective.

19 Q All right. I want to ask you about that in just a second,  
20 but before I get to that, let me just ask one more question  
21 about the teachers. Do you agree with me there's no evidence  
22 that the public schools are intentionally assigning novice  
23 teachers to classrooms with black students?

24 A I think that's right. One of the things that we did in  
25 our study was to look at whether there were imbalances within

1 elementary schools, for example. And to their credit, the  
2 principals of the schools of North Carolina are pretty darn  
3 fair in distributing within their schools -- I'm not sure  
4 that's responsive, but I would agree with you.

5 Q Okay. And then with regard to this bonus program, using  
6 bonuses to teachers -- to attract strong teachers to schools  
7 with high proportions of minority students, you would agree  
8 with me, wouldn't you, that the failure to have a bonus policy  
9 like that in place is not a policy of discrimination but rather  
10 the lack of a policy of affirmative action in terms of trying  
11 to get the teachers in there?

12 A Well, the first thing I would say -- I would amend what  
13 you said. It's a policy not only to attract and recruit, but  
14 also to retain. So that was what it was used. So it was  
15 applied to anybody that was already teaching. And is the  
16 question whether this is a failure of -- to be affirmative,  
17 yes.

18 Q Yeah. Is it a policy of discrimination, or is it, rather,  
19 a failure to engage in affirmative action to provide incentives  
20 to the teachers --

21 A I think it would be hard to argue that it's a policy of  
22 discrimination. It's a failure to do something that was proven  
23 to be effective and which probably a lot of people thought  
24 ought to be done, and I think there still are educators who  
25 believe that the hard-to-staff schools is a continuing problem,

1 not just in North Carolina but in other places, and a couple of  
2 school districts actually have tried their own ways to keep  
3 those good teachers in the hard-to-staff schools.

4 **MR. STRACH:** Thank you, Your Honor. That's all the  
5 questions I have.

6 **THE COURT:** Any redirect?

7 **MS. MEZA:** I just have a couple more questions.

8 REDIRECT EXAMINATION

9 **BY MS. MEZA**

10 Q Dr. Clotfelter, given your conclusions about  
11 intergenerational links between parental educational attainment  
12 and children's achievement, the State's history of official  
13 discrimination and State action has played a role in the  
14 continuing gaps -- racial gaps -- has that played a role in the  
15 continuing racial gaps in high school graduation rates and  
16 college graduation rates?

17 A I think it's hard to escape that conclusion. Because of  
18 this strong intergenerational link that happens within each  
19 pair of parents and children, past disparities have a way of  
20 living on.

21 **MS. MEZA:** Thank you, Dr. Clotfelter.

22 **THE COURT:** Hold on just a minute, please.

23 Can I refer you to paragraph 13 of your report, if  
24 you have that?

25 **THE WITNESS:** Yes.

1           **THE COURT:** And you say in the math test, for  
2 example, students with at least one parent who graduated from  
3 high school. Does that include students with -- in two-parent  
4 households?

5           **THE WITNESS:** The way --

6           **THE COURT:** What does that mean?

7           **THE WITNESS:** The way the State assessed the parental  
8 attainment of parents was to ask about the more highly educated  
9 of the parents. So for children with one parent, they had an  
10 answer. For children of two parents, then they would take the  
11 greater of those. So that's the way the question was asked.

12           **THE COURT:** Okay. And then the next paragraph you  
13 say that these various differences were controlled for based on  
14 a number of factors. Is marital status a factor that you  
15 reviewed?

16           **THE WITNESS:** I do not think so, and I think the  
17 reason was is that I don't think that this information appears  
18 in the student records that we were using. But I -- I think  
19 that's the answer, but I am not -- do I list it here? It's --

20           **THE COURT:** I didn't see it on the list. That's why  
21 I asked.

22           **THE WITNESS:** I think it's not in there. I could  
23 look, but I'd have to look at one of my --

24           **THE COURT:** Have you ever examined that?

25           **THE WITNESS:** I don't think so, and I think the



1 reason is because it's not in the North Carolina Education  
2 Research Data Center. I will bet you somebody has -- again,  
3 I'm saying -- I would speculate --

4 **THE COURT:** Okay. I don't want you to speculate.

5 **THE WITNESS:** -- that some people have done it, yeah.

6 **THE COURT:** Now, if I understood you correctly, you  
7 said that some of the schools that had more African-American  
8 children -- I don't know if you said predominantly or what you  
9 said, but more African-American children tended to have newer  
10 teachers. Was I right about that?

11 **THE WITNESS:** Okay. So there was two findings. One  
12 didn't look at the schools. It identified each child with his  
13 or her teacher; and in that study that was of seventh graders  
14 in 2001, we found that it was more likely for black children to  
15 have a math teacher who had never taught before that year. And  
16 it was something like 12-point something versus 8.3.

17 And then the other study didn't look at the -- that  
18 connection between the student and the teacher but, rather,  
19 looked at entire schools and split up the schools in terms of  
20 racial composition, and then said let's look at the teachers in  
21 these schools. So in that case, there wasn't the one-to-one  
22 connection.

23 **THE COURT:** What is the racial makeup of the teaching  
24 pool in North Carolina? Do you know?

25 **THE WITNESS:** I think it is -- has a lower

1 African-American percentage than the students, but I couldn't  
2 tell you.

3 **THE COURT:** Okay. I guess what I was confused by is  
4 I thought you said that since 19 -- sometime in the 1950s, the  
5 African-American average teacher salaries has exceeded that of  
6 non-African-Americans. Is that correct?

7 **THE WITNESS:** We only know that through, I think,  
8 about -- it might be the late '50s, and then that number has  
9 not been published. I guess it could be calculated, but I  
10 haven't seen it.

11 **THE COURT:** Okay. So how long did that average  
12 exceed that of non-African-Americans?

13 **THE WITNESS:** I don't know. Because in the data that  
14 I present in some -- one of these tables, it begins about --  
15 something like after World War II, and then it goes until the  
16 end of segregated schools, and so I don't know how long it  
17 lasted after that. It is something that could be determined.

18 **THE COURT:** Okay. Does this data tell us anything  
19 about whether African-American teachers are teaching in schools  
20 that are not predominantly African-American, that they're for  
21 some reason choosing other schools?

22 **THE WITNESS:** I have forgotten exactly what we found.  
23 My impression is that we found that these preferences were true  
24 for all teachers, but less so for minority teachers.

25 **THE COURT:** All right. Thank you.

1 Does anybody have any questions in light of my  
2 questions?

3 **MS. MEZA:** No, Your Honor.

4 **MR. STRACH:** No, Your Honor.

5 **THE COURT:** All right. Thank you, sir. You may step  
6 down.

7 We are going to take our afternoon break for  
8 20 minutes, and then we'll get back at 4:00.

9 (The Court recessed at 3:42 p.m.)

10 (The Court was called back to order at 4:07 p.m.)

11 **THE COURT:** Mr. Shapiro?

12 **MR. SHAPIRO:** Good afternoon, Your Honor. Your  
13 Honor, the United States calls as its next witness Ms. Terrilin  
14 Cunningham.

15 **TERRILIN C. CUNNINGHAM,** PLAINTIFFS' WITNESS, at 4:07 p.m.,  
16 being first duly affirmed, testified as follows:

17 DIRECT EXAMINATION

18 **BY MR. SHAPIRO**

19 Q Good afternoon, Ms. Cunningham.

20 A Good afternoon.

21 Q Ms. Cunningham, can you state your full name, please.

22 A My name is Terrilin Claiborne Cunningham.

23 Q Ms. Cunningham, where do you live?

24 A I live in Concord, North Carolina.

25 Q And have you lived anywhere else?

1 A Yes, I have.

2 Q Can you tell us where?

3 A I was born and raised in Missouri, St. Louis, Missouri.  
4 I've lived in Pennsylvania, Pittsburgh Metropolitan Area. And  
5 I've lived in Maryland, Baltimore, and some of the other areas  
6 in Maryland before moving here to North Carolina.

7 Q Okay. And when did you come to North Carolina?

8 A I came here at the end of May, 2012.

9 Q And why did you come to North Carolina in 2012?

10 A I moved here because my daughter and my son-in-law lived  
11 here, and I had lost my home and my business that I started  
12 had -- was on its way out, and I lost all of my assets and so I  
13 moved here to live with my daughter and my son-in-law to help  
14 me get back on my feet.

15 Q And are you still living with your son-in-law and your  
16 daughter now?

17 A No. I moved out.

18 Q When did you move out?

19 A I moved out February 1 of 2013.

20 Q And so now you have your own place?

21 A Yes.

22 Q And how do you support yourself?

23 A Well, I have three jobs. I'm an insurance agent, I'm also  
24 a personal care attendant, and recently I started a business as  
25 a Mary Kay consultant.

1 Q And you are an insurance agent for what company?

2 A For Optum Services, and that's a subsidiary of United  
3 HealthCare.

4 Q And you are providing personal care for what -- what  
5 business?

6 A For Elite Home Health Care.

7 Q And what are the hours of those different jobs?

8 A Well, Elite, I work from 8:00 until 11:00 Monday through  
9 Friday. And then I work --

10 **THE COURT:** Is that 8:00 a.m. to 11:00 a.m.?

11 **THE WITNESS:** Did I say 8:00 p.m.?

12 **THE COURT:** No, you didn't say either. I am asking.

13 **THE WITNESS:** It is 8:00 a.m. until 11:00 a.m. Monday  
14 through Friday. And then I work Monday, Tuesday, and Wednesday  
15 from 12:00 p.m. until 11:00 p.m. at Optum Services. And also I  
16 work Saturday evening from 12:00 p.m. until 11:00 p.m. And  
17 then my Mary Kay business, I do that on Thursday evenings,  
18 Friday evenings, and an occasional Saturday morning.

19 **BY MR. SHAPIRO**

20 Q So if I understood you correctly, your job for Optum  
21 Services, which is the medical insurance job, is that a  
22 40-hour-a-week job?

23 A Yes, I work 10-hour days, four 10-hour days.

24 Q Given that you have that full-time job, why is it that you  
25 have the other two jobs?

1 A So that I can afford to live. So I can pay rent and  
2 house -- I mean, rent and car and food.

3 Q And how much does your full-time job with the medical  
4 insurance company pay?

5 A You mean hourly or per week?

6 Q Per week.

7 A Before or after taxes?

8 Q Let's say before taxes.

9 A \$600.

10 Q And what type of flexibility do you have in that job in  
11 terms of if you are late to work or if you need to take time  
12 off? How does that work?

13 A There is not room for error, not a lot of room for error  
14 on that job when it comes to working your assigned hours.

15 Q What happens if you are, let's say, late by four minutes?  
16 How does that work?

17 A That is half of an occurrence.

18 Q And explain to us how these occurrences add up or how they  
19 work.

20 A Well, if you are late for four minutes, you get half of an  
21 occurrence. If you are late for 15 minutes, you get a full  
22 occurrence. Once you get three occurrences, you are put on  
23 corrective action; and if you get another occurrence, you are  
24 fired.

25 Q Ms. Cunningham, before I move on, you were telling us

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 about your family. Just to clarify, how many children do you  
2 have?

3 A I have four children.

4 Q And are you married?

5 A Not anymore. I am divorced.

6 Q Now, Ms. Cunningham, I would like to ask you a few  
7 questions about your voting experiences.

8 A All right.

9 Q Ms. Cunningham, do you vote?

10 A Yes, I do.

11 Q How often do you vote?

12 A As often as I possibly can.

13 Q And why do you vote as often as you can?

14 A I'm not always -- I can't always afford the time to go  
15 vote because of the way that I work.

16 Q Ms. Cunningham, you said you try to vote as often as you  
17 can. Why are you making that effort?

18 A Because I believe in voting. I believe that I have a  
19 voice, and my voice counts.

20 Q And how does that belief relate to your -- the way you  
21 were raised and your family experiences?

22 A My mother when I was a child -- my mother worked for the  
23 polls in St. Louis. On other years, she volunteered to pick  
24 people up and take them to the polls. I rode in the car all  
25 day listening to people talk about voting and how important it

1 was to vote, and that just kind of got into me; and as I got to  
2 be voting age, I made sure that I voted.

3 When my children got to be voting age, I took them for  
4 their first vote, made sure that they understood the importance  
5 of having a voice and expressing their voice.

6 Q And, Ms. Cunningham, have you ever voted by mail?

7 A No.

8 Q And why not?

9 A Because I want the experience to walk in, pull the lever,  
10 see my ballot go into the ballot box and know that my vote is  
11 being counted.

12 Q Ms. Cunningham, you said that you came to North Carolina  
13 in 2012. Have you voted since you came to North Carolina?

14 A Yes, I have.

15 Q And when have you voted?

16 A I voted in 2012, the national election, and then I voted  
17 in 2014 in November, the November election.

18 Q Okay. When you refer to the November 2012 national  
19 election, you are referring the Presidential election?

20 A Yes.

21 Q Let's take those one by one. Can you tell us how you  
22 voted in the 2012 election, how that played out?

23 A You mean who I voted for?

24 Q No, certainly not. Tell us how you went about voting in  
25 that election.



1 A Well, at the time, I was living with my daughter and my  
2 son-in-law. My car had broken down that I had brought to North  
3 Carolina, and then because I didn't have a job, I was hunting  
4 for a job but didn't have a job, it got repossessed, so I  
5 didn't even have a chance to fix it.

6 Q You are referring to your car?

7 A My car. And so I was dependent on my daughter and my  
8 son-in-law to take me everywhere that I needed to go. They had  
9 taken me to church. We were sitting in church, and I really  
10 didn't think I would have a chance to vote because they both  
11 lead very busy lives. While we were sitting there, I became  
12 aware that North Carolina has Sunday voting, something I had  
13 never heard of before.

14 Q How did you become aware of that?

15 A My pastor then -- he was my new pastor -- was explaining  
16 that we needed to go vote. People get out there and vote, and  
17 he said, as a matter of fact, there is a polling site right  
18 down the street from the church. He said, go take your family  
19 to go vote and then go out to eat.

20 So my son-in-law, who was sitting next to me, learned over  
21 and he said, Mom, he said, I'll take you to vote, and then  
22 we'll go get lunch. So I took him up on it.

23 Q Ms. Cunningham, what were the race of most of the  
24 congregants in that church?

25 A Our church is a predominantly African-American church.

1 Q And what is the name of the church?

2 A It's called The Park, or the official name is University  
3 Park Baptist Church.

4 Q If you could tell us, Ms. Cunningham, what did you do --  
5 if you could describe what you did after you heard about the  
6 possibility of voting down the road, if you could describe how  
7 that played out.

8 A Well, sure. My son-in-law and I got in the car. We went  
9 down the road probably about five or six blocks. We got out,  
10 talked to a few of the people who were canvassing or  
11 campaigning. Then we got in line, and we talked to a few of  
12 the people who were in line. He saw some people that he knew  
13 from church. We talked and we went through the line and got in  
14 and voted basically.

15 Q And you mentioned the line when you were waiting to vote.  
16 What was the race of most of the people in that line?

17 A They were African-American.

18 Q Now, when you look back at that experience of voting in  
19 2012, how do you feel -- strike that.

20 What did you think after that experience in 2012?

21 A Well, I'll put it this way: When I came to North  
22 Carolina, I was in a pretty bad way, and one of the things that  
23 kind of helped to start to heal me was the fact that I was able  
24 to go and vote, go and put the -- help put the person in office  
25 that I wanted in office for President, and it was an empowering

1 move for me that day.

2 It was -- it started to make me feel a whole lot better  
3 about coming south, when I had kind of avoided coming south  
4 because of my experiences and -- the things that I've heard  
5 about the South. I really didn't think that I belonged in the  
6 South with my thinking, I will put it that way.

7 Q And so how did this -- so strike -- okay. So could you  
8 explain what you mean by that a little bit further?

9 A Well, just the fact that I could vote on a Sunday. When  
10 Sunday is the time that I spend with my family, I could go and  
11 do that with my son-in-law. That was a bonding experience for  
12 us. Just those are the kind of values that I have, and Sunday  
13 voting actually supported my values.

14 Q I see. And how easy would it have been for you to vote in  
15 that election had you not been able to vote on a Sunday?

16 A Not easy, because my children have busy lives of their  
17 own. I didn't come here to become a burden, take me here, take  
18 me there; but since we were out, I was able to go vote, but I  
19 would not have tried to get them after they work on their jobs  
20 all day to take me to vote.

21 Q And you indicated that you waited in line for some time.  
22 How long did you wait?

23 A Somewhere around 20 to 30 minutes or so. You know, not  
24 bad. Not bad.

25 Q And you've also indicated you are a busy person, you have

1 work. How is it that you were able to take that time out of  
2 your day to do voting on that Sunday?

3 A Well, because I don't work on Sundays, for one thing. I  
4 go to church on Sunday, and I spend Sundays with my family.  
5 That's what I traditionally do. That's how my family works.

6 Q How respectful have employers been, in your experience,  
7 with allowing you to have that Sunday period?

8 A I have never worked for an employer who required me --  
9 after I told them that that was my day of prayer and of worship  
10 and family, I have never had an employer to deny me and cause  
11 me to work on Sunday.

12 Q Is that something you raise with employers?

13 A Yes. Whenever I go in for an interview or anything, and  
14 they ask me what days can you work, I distinctly tell them I  
15 cannot work on Sunday.

16 Q Thank you, Ms. Cunningham. Let's now turn to 2014. In  
17 2014, were you still a member of that church?

18 A Yes.

19 Q And how did you go about voting in 2014? Strike that.

20 Did you vote on Election Day, or did you vote during the  
21 early voting period?

22 A No. I voted on Election Day.

23 Q Why did you vote on Election Day and not during the early  
24 voting period, given the great experience you had in 2012  
25 voting on a Sunday?

1 A Well, I did attempt to vote early, and it was my intention  
2 to vote early; but during that time of year is called open  
3 enrollment for Medicare, and that's what I do. I work with  
4 Medicare insurance, and I was working very long hours, and also  
5 my health was failing. So my doctor had me scheduled for  
6 numerous -- I ended up having a procedure after all this, but  
7 numerous tests. And so in preparation for the tests, things  
8 like that, so I could not -- while I was working and doing all  
9 those tests, I couldn't fit that in, fit the voting in, even  
10 though I tried before that.

11 Q And you mentioned that you had some tests performed on  
12 you. If I may ask, what kind of medical conditions were you  
13 suffering from?

14 A Well, I have diabetes, high blood pressure, high  
15 cholesterol, arthritis, and then finally found out that I had  
16 polyps that had to be removed.

17 Q So I think you explained to us why you were unable to vote  
18 during the early voting period. Did you try to vote on  
19 Election Day?

20 A Yes, I did.

21 Q And what time of the day did you attempt to vote on  
22 Election Day?

23 A Well, I went to vote at approximately 12:30, right before  
24 I went to work.

25 Q Why did you vote at that time?

1 A Because that morning I had an eye appointment, an  
2 ophthalmology appointment, a diabetic appointment, and then I  
3 went to go visit a -- one of my parishioners who was very sick  
4 at home. She had called for me to come, and I went to go visit  
5 her, and I stopped to get some things for her before I went to  
6 visit her.

7 Q Where did you stop to get the provisions for her?

8 A At Wal-Mart.

9 Q Okay. And when you say you stopped to -- did you say --  
10 use the word "minister" for this individual?

11 A I went to minister to her, yes.

12 Q Could you explain what you mean by that?

13 A In my faith, when a person is sick, they call for the  
14 elders. I am an elder. I'm an ordained minister. What we do  
15 is we go and we anoint them and pray over them, and I counseled  
16 her and worked with her to build up her faith so that she could  
17 be healed.

18 Q So you've explained to us that you went to your medical  
19 appointment and you went to purchase some provisions at  
20 Wal-Mart, and then you went to minister to this individual, and  
21 then you went to vote, and then presumably to work?

22 A Yes.

23 Q Why in that order?

24 A Well, I knew I had a lot to do that day, so I looked at  
25 where my eye appointment was and where she was, and I just kind

1 of made a circuit to make sure that I didn't waste any of my  
2 resources, my gas, and get everything done -- be able to get  
3 everything done that I needed to do before I went to work.

4 Q Would you have been able to accomplish all those things in  
5 any other order, in your view?

6 A I don't think it would have worked because I would have  
7 been backtracking if I would have tried to do anything  
8 different.

9 Q And where did you go to vote?

10 A The police substation down the street from where I work.

11 Q And why did you choose that police substation as the place  
12 to go vote?

13 A Because it was the closest place to where I worked, and I  
14 knew that I could -- I would pass it on my way to work.

15 Q And how did the way you go about -- how did the way you  
16 went about identifying this as your -- the place where you  
17 would go to vote differ from what you had done when you resided  
18 in, let's say, Missouri?

19 A How did the way I went about --

20 Q Deciding where you would go to vote.

21 A Well, I knew that you had to vote inside of your county.  
22 You had to register and vote inside of your county.

23 **THE COURT:** Where? Missouri or here?

24 **THE WITNESS:** No, here in -- so I was registered in  
25 Mecklenburg before, and I voted in Mecklenburg. So once I was

1 registered in Cabarrus County, I knew I needed to vote in  
2 Cabarrus County.

3 **BY MR. SHAPIRO**

4 Q Did you think you could vote anywhere in the county?

5 A Yes.

6 Q Why is that?

7 A Because when I voted before, we just -- I just voted down  
8 the street from our church, which we didn't live anywhere near  
9 the church. We lived on the other side of Charlotte from the  
10 church.

11 Q Okay. So, in other words, because of the experience you  
12 had in 2012 during the early voting period, you thought you  
13 could do the same, vote anywhere in the county in 2014? Did I  
14 understand you correctly?

15 A Yes.

16 Q Okay. So if you could tell us, what happened when you  
17 went to the police station to vote?

18 A I went in and gave my -- gave her my name, and she told me  
19 I was in the wrong place, and the woman that had been talking  
20 to me, she went and talked to another lady. They came back and  
21 said you can vote a provisional vote.

22 Q Okay.

23 A So --

24 Q What happened then?

25 A I filled out the paperwork, and I did my voting on the

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15



1 provisional ballot. I sealed it up and gave it back to her  
2 to -- and watched to make sure that my ballot went into the  
3 box, and then I scurried off to work.

4 Q And how long did it take you to get to work?

5 A About two or three minutes. It's really just a couple of  
6 blocks probably between the substation and where I work.

7 Q Did you manage to get to work on time?

8 A Yes, I did.

9 Q And did the poll worker tell you at any time that your  
10 vote may not count?

11 **MR. MCKNIGHT:** Objection, Your Honor, on the hearsay  
12 grounds that we've been raising.

13 **MR. SHAPIRO:** This goes to state of mind, Your Honor.

14 **THE COURT:** It's overruled. I will consider it for  
15 state of mind and to explain what she did next.

16 **THE WITNESS:** So would you ask me that again?

17 **BY MR. SHAPIRO**

18 Q Did a poll worker or anyone tell you that your vote would  
19 not count?

20 A No, no one told me that it wouldn't count.

21 Q And what was your belief at the time about whether your  
22 vote would be counted?

23 A That the votes -- that the regular votes would be counted  
24 first and then the provisional vote would be counted.

25 Q And do you have any recollection of a poll worker telling

1 you the polling site you should go to?

2 A Well, once they started pulling out all the paperwork and  
3 everything, I have no recollection of them telling me where. I  
4 just -- I just -- my memory is just on getting that paperwork  
5 done.

6 **MR. SHAPIRO:** Your Honor, if I may approach?

7 **THE COURT:** Yes.

8 **MR. SHAPIRO:** I am going to show Plaintiffs'  
9 Exhibit 309.

10 **BY MR. SHAPIRO**

11 Q Ms. Cunningham, do you see an image on the monitor there?

12 A Yes.

13 Q And do you recognize that photograph?

14 A Yes, I do.

15 Q And who took that photograph?

16 A I took it myself.

17 Q As the official term, is that a selfie?

18 A Selfie, yes.

19 Q When did you take that photograph?

20 A Right before I got ready to go into work after voting,  
21 drove down the street. Right before I got ready to go into  
22 work, I snapped that picture.

23 Q Okay. And there is some text there as well. Can you tell  
24 us what that text is -- actually, strike that.

25 Can you read the text?

1 A Thank you for making that bigger.

2 "I went to an ophthalmology appointment, shopped at  
3 Wal-Mart, visited the sick, VOTED," in large letters, "and now  
4 on my way to put in 8 to 9 hours at work #noexcusesvotepeople."

5 Q And where did you write those words?

6 A I put that on Facebook.

7 Q And did you write -- that's what you wrote?

8 A Yes, I wrote that.

9 Q Why did you write that?

10 A For some reason, I have a lot of young people who are my  
11 followers. My children's friends and even my children's  
12 friends' children follow me on Facebook. So I try to put  
13 nothing but positive things so that -- and this was something  
14 that I really want to -- just like it was taught to me, I want  
15 to teach it to young people to vote and not to use any excuse,  
16 but to vote.

17 Q All right. Thank you, Ms. Cunningham. I am now going to  
18 show you an excerpt of what's previously been moved into  
19 evidence as Plaintiffs' Exhibit 305, a page from that exhibit.

20 **MR. SHAPIRO:** Actually, before I do that, Your Honor,  
21 I would ask to move into evidence Plaintiffs' Exhibit 309,  
22 which is the photograph.

23 **THE COURT:** Admitted.

24 **MR. SHAPIRO:** Thank you, Your Honor.

25 **THE COURT:** This is already in evidence; right?

1           **MR. SHAPIRO:** Yes, it is, Your Honor. That's just an  
2 excerpt of the larger stipulation at page 7 of that  
3 stipulation.

4 **BY MR. SHAPIRO**

5 Q     Ms. Cunningham, do you see that?

6 A     Yes, I do.

7 Q     And that is an extract from a State Board of Elections  
8 database that has some information about your voting practices  
9 and experiences in the past, including the 2014 election.

10       I want to direct your attention to the column with your  
11 name and the portion of the column where it says "Vote  
12 Counted." And there is an N that's highlighted for no. Do you  
13 see that?

14 A     Yes, I do.

15 Q     And do you see there is a little note there that says,  
16 "Assigned Precinct 12-05," indicating that you voted in the  
17 wrong precinct? Do you see that?

18 A     Yes.

19 Q     And so that indicates that your vote, in fact, was not  
20 counted. And how does that affect your view on the -- if you  
21 will tell the Court, on the failures and the integrity of the  
22 election system in this state?

23 A     It really causes me pain to feel like I did what I was  
24 supposed to do to vote. I did exactly -- not exactly, but I  
25 did something similar to what I had done in 2012, and my vote

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 counted and the cause that I was voting for went over. And  
2 when I expected that to happen in 2014, for me to find out that  
3 it didn't, I lost a lot of faith in North Carolina.

4 I am trying to understand, you know, why it's changed now.  
5 When it was great in 2012, why did that have to change, and why  
6 wasn't my vote counted?

7 **MR. SHAPIRO:** Thank you, Ms. Cunningham. No further  
8 questions.

9 **THE COURT:** Any cross?

10 **MR. MCKNIGHT:** Yes, Your Honor.

11 CROSS-EXAMINATION

12 **BY MR. MCKNIGHT**

13 Q Good afternoon again, Ms. Cunningham. We met last month  
14 for your deposition in Concord. Just a few questions for you  
15 about your voting experiences in 2012 and 2014. In 2012, I  
16 believe you testified that you voted on a Sunday; correct?

17 A Yes.

18 Q And do you remember whether it was during the beginning of  
19 the early voting period or at the end?

20 A I am not sure.

21 Q All right. And then after you moved from Charlotte to  
22 Cabarrus County, I believe you updated your driver's license at  
23 the DMV; is that correct?

24 A Yes.

25 Q And at the same time, you also changed your voter

NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15

1 registration to Cabarrus County; is that right?

2 A Yes.

3 Q And you didn't have any difficulty in registering to vote  
4 in Cabarrus County at the DMV, did you?

5 A No.

6 Q After you registered to vote in Cabarrus County through  
7 the DMV, you received a voter registration card in the mail,  
8 didn't you?

9 A Yes.

10 Q And before you moved to North Carolina, I know you talked  
11 about living in three other states. I believe in your  
12 deposition we talked about the fact that you had voted in at  
13 least two other states; is that right?

14 A Yes.

15 Q And those two other states are Missouri and Pennsylvania;  
16 is that right?

17 A That's right.

18 Q And early voting wasn't an option for you when you lived  
19 in either of those states, was it?

20 A No.

21 Q So if you voted in person in Missouri or Pennsylvania, you  
22 had to do it on Election Day; correct?

23 A Yes.

24 Q And when you lived in Missouri and Pennsylvania, if you  
25 voted in person on Election Day, you had to vote at your

1 assigned polling place; correct?

2 A Yes.

3 Q And when you voted in person on Election Day when you  
4 lived in Missouri and Pennsylvania, you always voted at your  
5 assigned polling place, didn't you?

6 A Yes.

7 Q And isn't it true that there were times when you lived in  
8 Missouri and Pennsylvania that you were busy on Election Day?

9 A Yes.

10 Q And that required you to do some planning so that you  
11 could make it to your assigned polling place, didn't it?

12 A Yes.

13 Q And in thinking about voting in North Carolina -- before  
14 we sat down for your deposition last month, I think you  
15 testified that perhaps the day before your deposition that you  
16 were able to look up your voter information online; correct?

17 A After I found out that I could look it up on online, yes.

18 Q And how did you find out you could look it up online?

19 A In talking with Attorney Shapiro, he told me that it was  
20 available online. I didn't know that my personal information  
21 was online like that.

22 Q And I believe you said you were able to find it using  
23 Google; is that correct?

24 A Yes. I Googled where to look it up, and then I looked it  
25 up.

1 Q Among the information you were able to find online was  
2 your assigned polling place, which is Cabarrus Senior Center,  
3 isn't it?

4 A Yes, I know it is the senior center.

5 Q Were you able to find that information when you looked up  
6 your voter information online?

7 A Yes.

8 Q If you had known that you had to vote in your assigned  
9 polling place on Election Day November 2014, you could have  
10 planned your day so that you could have voted before you went  
11 to Wal-Mart or visited your friend, couldn't you have?

12 A If I would have known that that was a stipulation, yes.

13 Q If you had to, you could have gone to Wal-Mart and you  
14 could have visited your friend on a different day, couldn't you  
15 have?

16 A I could not have visited her on a different day, no.

17 Q Okay. Why is that?

18 A Because she had called for me as her elder.

19 Q Okay. All right.

20 **MR. MCKNIGHT:** I don't think I have any further  
21 questions for you, Ms. Cunningham.

22 **THE COURT:** Any redirect?

23 **MR. SHAPIRO:** Yes, Your Honor.

24 REDIRECT EXAMINATION

25



1 **BY MR. SHAPIRO**

2 Q Ms. Cunningham, you were asked a few questions about  
3 voting in Missouri. Did you ever miss any elections while you  
4 were in Missouri that you would have liked to have voted in?

5 A I believe there were some that I would have liked to have  
6 voted in that I may have missed maybe.

7 Q Have they -- to your knowledge, has Missouri changed its  
8 election system in recent years in ways that may have made it  
9 harder for you to vote?

10 A I am not aware of any.

11 Q I want to be very clear. On the day that you voted in  
12 2014, you had provided testimony on how busy that day was.

13 A Right.

14 Q Would you have been able to vote in any other way other  
15 than the way that you did vote that day?

16 A No. I still would have to do the things that I had to do  
17 for my own health and for my church member.

18 **MR. SHAPIRO:** Thank you. No further questions.

19 **RECROSS-EXAMINATION**

20 **BY MR. MCKNIGHT**

21 Q Ms. Cunningham, I think you just testified earlier, and  
22 Mr. Shapiro just touched on this, you said you had to go visit  
23 your church member that day.

24 If a church member calls you and it is a day that you are  
25 working all day, you are working -- certainly, it sounds like

1 you're a busy lady. You were working all day long and one or  
2 two jobs in the same day. What happens when somebody like that  
3 calls? Do you not have to tell them you ought to come see them  
4 on a different day, or do you take off work?

5 A I wouldn't take off work, but I would work them into my  
6 schedule.

7 **MR. MCKNIGHT:** No further questions, Ms. Cunningham.

8 **THE COURT:** All right, ma'am, you may step down.

9 **MS. GARRETT:** Hello, Your Honor. We've resolved the  
10 technical glitch and --

11 **THE COURT:** My experience is that's usually followed  
12 by the phrase "for now."

13 **MS. GARRETT:** For now. We would like to continue to  
14 play the trial deposition testimony of Dr. Lynne  
15 Vernon-Feagans, starting at page 37, line 1.

16 **THE COURT:** All right.

17 **MS. GARRETT:** Can we start?

18 **THE COURT:** Yes, please.

19 (Designated portions of the deposition of Lynne  
20 Vernon-Feagans continued to be played.)

21 **THE COURT:** Stop. Thank you. I don't think we are  
22 going to finish in a minute or so on this, and I have one issue  
23 that I want to take up. So if we could run the risk of the  
24 technology maybe not working in the morning at the same spot,  
25 but I'm going to hope it will, we'll pick up right there if we

1 can and then go from there.

2 I wanted to ask you where you were, if you talked to  
3 each other about any differences you still have on the issue of  
4 the hearsay objection? Has there been any progress, or have  
5 you had time to address that?

6 **MR. DONOVAN:** We haven't really had time to address  
7 it.

8 **THE COURT:** Okay. Can you all address that tonight  
9 between now and in the morning, and just let me know the nature  
10 of the difference, if there is one, or whether you've come to  
11 some conclusion? And you have potentially a goose-gander issue  
12 on late-blooming information. So you all decide what you want  
13 to do, if anything, about that, whether you are going to stick  
14 to your motions or whether you've made some arrangement. Just  
15 advise me in the morning and then I will rule if I need to. I  
16 appreciate that.

17 **MR. DONOVAN:** What time tomorrow?

18 **THE COURT:** I would like to start at 9:00. I may  
19 have told you all earlier I was thinking 9:30; but I think if  
20 we stay on schedule, we should be able to finish up within  
21 three weeks, I hope.

22 **MR. DONOVAN:** I agree.

23 **MR. FISHER:** I mentioned the *Bolden* case earlier. So  
24 I wanted to just bring to the Court's attention we took a look  
25 at that case, and what we see is cited statements from

1 newspaper articles in that case. We do see the Court relying  
2 on those statements as it makes a finding of discriminatory  
3 purpose. I wanted to mention a couple of other cases.

4 **THE COURT:** What kind of newspaper articles were  
5 they?

6 **MR. FISHER:** In this case, Your Honor, I don't have  
7 the specific newspaper that it came from, but the Court does  
8 have a block quote coming from a newspaper article and then  
9 references that article again later in the opinion when it  
10 makes a determination on discriminatory purpose.

11 **THE COURT:** Do you know what page of the opinion that  
12 comes from?

13 **MR. FISHER:** Yes, it would be 1062.

14 **THE COURT:** What is the full cite?

15 **MR. FISHER:** 542 F. Supp. 1050, and the pages that I  
16 am referencing are 1062 and 1074.

17 **THE COURT:** All right.

18 **MR. FISHER:** In a similar light, we have the *Dillard*  
19 case. That's 640 F. Supp. 1347, and that's pages 1357 to 1359.  
20 And also *United States Versus Brown*, and that's 494 F. Supp. 2d  
21 440. I don't have a pin cite on that one.

22 But, Your Honor, also if I could take a moment -- I  
23 know we are breaking. You mentioned, you know, resolving  
24 issues with the Defendants. I think at this point, you know,  
25 where we are, just if I could frame real quickly -- we

1 haven't -- as far as I know, the Plaintiffs -- and we haven't  
2 offered a specific newspaper article into evidence at this  
3 point. We haven't proffered anything. I know there is the  
4 issue of the stipulations, but we haven't proffered anything.

5           The way that we have kind of come to this point is  
6 that we have experts, and ten experts, and the United States  
7 has one in Dr. Lawson that we will be presenting towards the  
8 end of the week that rely on newspaper articles to come to  
9 their conclusions. Again, we would say that with regard to  
10 Dr. Lawson and the other intent experts that their reliance is  
11 highly relevant to the issue of legislative purpose, and we  
12 feel that those articles, you know, reflect their methodology,  
13 and they're the best way that they can get at that purpose.

14           We would just reference the Court to those cases and  
15 say that we believe the experts are entitled to rely on those  
16 reports. Again, when I have Dr. Lawson up here on the stand, I  
17 can hit the wave tops of his report, and I can excise  
18 referencing a newspaper article here in the court. But as Your  
19 Honor goes back and reads that report in chambers, you are  
20 going to see references to newspaper articles throughout, and I  
21 just want to caution that we don't think that those  
22 references -- we think those should carry weight with the  
23 Court. We don't want those references to be disregarded at  
24 all.

25           **THE COURT:** I understand. It all depends on what

1 they are being offered for, in my view. Again, my concern is  
2 that if there is a piece of information that I would not rely  
3 on, and ultimately I have to make the decision, but an expert  
4 says but that's the kind of stuff I rely on when I write my  
5 reports and come up with my decisions, it seems to me the  
6 expert is trying to then use material that I would not find  
7 reliable, but the expert says but it's good enough for me.  
8 That's my concern. I will take a look at the cases.

9           **MR. FISHER:** Again, Your Honor, we can go into a  
10 little bit more on the methodology with Dr. Lawson. I think  
11 that he will testify that in his practice his methodology is to  
12 rely on newspaper articles to come to his conclusions and that  
13 he has used those in this case to draw inferences and to draw  
14 conclusions about discriminatory purpose. Ultimately, you  
15 know, the question that --

16           **THE COURT:** I understand that, but the question is  
17 whether in a court of law I can allow an expert to say, yes, I  
18 think it was discriminatory and I relied on a bunch of  
19 information that you, Judge, otherwise probably would not have  
20 let into evidence. That's my concern. We don't need to debate  
21 it. I will take a look at the cases. It depends on what the  
22 information is.

23           For example, if the expert relies on the newspaper  
24 article, as one of the experts today testified to, that  
25 referred to an Attorney General opinion and then he went to go

1 get the AG opinion, that's not the same situation of what I am  
2 concerned about. I am concerned about a double hearsay  
3 statement because it's in a newspaper that quotes yet somebody  
4 else, and that's being offered for the truth of the assertion  
5 in the statement, that is, the intent of that person.

6 I have some hesitation about that. Even if an expert  
7 says it is good enough for me as an expert, that's why they  
8 teach and that's their job and they are doing it for a  
9 different purpose many times, it may be perfectly fine for  
10 writing books and articles, but it is a little difficult if it  
11 has to meet an evidentiary standard.

12 **MR. FISHER:** Your Honor, we would never draw the  
13 equivalence between judges and professors.

14 **THE COURT:** Someday I am hoping to reach that status.

15 **MR. FISHER:** But Dr. Lawson will come and he will  
16 talk about his methodology, and he will talk about the  
17 conclusions that he drew.

18 Again, the information you will see will be wave  
19 tops, and I can certainly avoid talking about newspaper  
20 articles during the testimony you see in this court. However,  
21 I did want to caution the Court, when you do read his report,  
22 there will be references to newspaper articles there, and I  
23 don't know -- I just wanted to frame that issue.

24 **THE COURT:** Well, I can't determine which newspaper  
25 articles are inappropriate unless there is some showing that

1 it's an inappropriate article. Otherwise, as a general matter,  
2 I think I've already said, many of these experts, I would  
3 think, could rely on press reports, depending on why they are  
4 using them. So I will leave it at that.

5 All right. Anything else we need to address? All  
6 right. Have a good evening. We'll see you at 9:00.

7 (The Court recessed at 5:08 p.m.)

8

9 END OF TRIAL DAY TWO

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NAACP, et al. v. NC, et al. - Trial Day 2 - 7/14/15



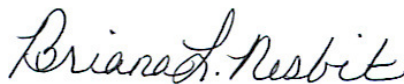
1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

4  
5  
6 I, Briana L. Nesbit, Official Court Reporter,  
7 certify that the foregoing transcript is a true and correct  
8 transcript of the proceedings in the above-entitled matter.

9  
10 Dated this 26th day July of 2015.

11  
12 

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14 Briana L. Nesbit, RPR  
15 Official Court Reporter  
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